



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

May 16, 2014

Dr. Samuel T. King
Superintendent
Norfolk Public Schools
800 E. City Hall Avenue
Norfolk, Virginia 23510

Re: OCR Complaint No. 11-13-1106
Letter of Finding

Dear Dr. King:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint, received on February 8, 2013, against Norfolk City Public Schools (the Division) regarding her daughter (the Student). Specifically, the Complainant alleged:

1. The high school attended by the Student (the School) failed to promptly and appropriately respond to incidents where the Student was subject to peer disability and sexual harassment; and
2. During the 2012-2013 school year, the School failed to reevaluate the Student to consider whether there was a significant change in placement when she required daily administration of medication.

OCR initiated an investigation of the complaint under its authority for enforcing Title IX of the Education Amendments Act of 1972 (Title IX) and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any program or activity receiving federal financial assistance (FFA). OCR is also 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, and 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 any a recipient of FFA and public entities. Because the Division is a recipient of FFA and is a public entity, it is subject to the provisions of Title IX, Section 504, and Title II.

OCR requested and reviewed data responses from the Division. OCR also conducted interviews with Division and School personnel, the Complainant, the Student, and the Complainant's witnesses. In addition, OCR conducted an onsite visit to six of the Division's schools: two high schools and four middle schools. At each school, OCR facilitated student focus groups and interviews with school administrators about individual instances of disability and sexual

harassment. As a result of the investigation, OCR identified compliance concerns. OCR's analysis and determinations are discussed below

Allegation 1: The School failed to promptly and appropriately respond to incidents where the Student was subject to peer disability and sexual harassment.

Legal Standards

Title IX

The regulation implementing Title IX, at 34 C.F.R. §106.31(a), provides that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity operated by a recipient of FFA. Sexual harassment that creates a hostile environment is a form of sex discrimination prohibited by Title IX.¹ Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence. Sexual harassment of a student creates a hostile environment if the conduct is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the recipient's program.

In determining whether this denial or limitation has occurred, OCR examines all the relevant circumstances from an objective and subjective perspective, including: the type of harassment (e.g., whether it was verbal or physical); the frequency and severity of the conduct; the age, sex, and relationship of the individuals involved (e.g., teacher-student or student-student); the setting and context in which the harassment occurred; whether other incidents have occurred in the division; and other relevant factors. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. For example, a single instance of rape is sufficiently serious to create a hostile environment. It is the totality of the circumstances in which the behavior occurs that is critical in determining whether a hostile environment exists. Consequently, in using the factors discussed previously to evaluate incidents of alleged harassment, it is always important to use common sense and reasonable judgment in determining whether a hostile environment has been created.

When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. If an investigation reveals that sexual violence created a hostile environment, the school must then take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the

¹ The applicable legal standards described herein are more fully discussed in OCR's 2011 Dear Colleague Letter on Sexual Violence, which is available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> (Apr. 4, 2011), for further clarification on this topic, see "Questions and Answers on Title IX and Sexual Violence" (Apr. 29, 2014), which is available at: <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>. See also OCR's 2010 Dear Colleague Letter on Harassment and Bullying, which is available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> (Oct. 26, 2010); OCR's Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, which is available at: <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html> (Jan. 19, 2001).

hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.

Title IX requires a school to protect the complainant and ensure his or her safety as necessary, including taking interim steps before the final outcome of any investigation. The school should take these steps promptly once it has notice of a sexual violence allegation and should provide the complainant with periodic updates on the status of the investigation. If the school determines that the sexual violence occurred, the school must continue to take these steps to protect the complainant and ensure his or her safety, as necessary. The school should also ensure that the complainant is aware of any available resources, such as victim advocacy, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement.

If a school delays responding to allegations of sexual violence or responds inappropriately, the school's own inaction may subject the student to a hostile environment. If it does, the school will also be required to remedy the effects of the sexual violence that could reasonably have been prevented had the school responded promptly and appropriately. For example, if a school's ignoring of a student's complaints of sexual assault by a fellow student results in the complaining student having to remain in classes with the other student for several weeks and the complaining student's grades suffer because he or she was unable to concentrate in these classes, the school may need to permit the complaining student to retake the classes without an academic or financial penalty (in addition to any other remedies) in order to address the effects of the sexual violence.

Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity. If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures. Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus. For example, if a student alleges that he or she was sexually assaulted by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator's friends, the school should take the earlier sexual assault into account in determining whether there is a sexually hostile environment. The school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates.

The Title IX implementing regulation at 34 C.F.R. §106.8(a) requires a school division to designate at least one person to coordinate its efforts to comply with and carry out its responsibilities under Title IX (the Title IX Coordinator), and a division must notify all students and employees of the name or title, office address, and telephone number of the designated coordinator. A Title IX coordinator's core responsibilities include overseeing the school's response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints. This means that the Title IX

coordinator must have knowledge of the requirements of Title IX, of the school's own policies and procedures on sex discrimination, and of all complaints raising Title IX issues throughout the school. To accomplish this, subject to the exemption for school counseling employees, the Title IX coordinator must be informed of all reports and complaints raising Title IX issues, even if the report or complaint was initially filed with another individual or office or if the investigation will be conducted by another individual or office. The school should ensure that the Title IX coordinator is given the training, authority, and visibility necessary to fulfill these responsibilities.

A school division must ensure that the employee designated to serve as Title IX coordinator has adequate training on what constitutes sexual harassment, including sexual violence, and that he or she understands how the division's grievance procedures operate. The Title IX implementing regulation at 34 C.F.R. §106.8(b) requires a school division to adopt and publish grievance procedures providing for a prompt and equitable resolution of student and employee complaints alleging sex discrimination. OCR examines a number of factors in evaluating whether a division's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedure to students, parents and employees, including where to file complaints; application of the procedure to complaints alleging discrimination by employees, other students, and third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; written notice to the parties of the outcome of the complaint and any appeal; and an assurance that the division will take steps to prevent further harassment and to correct its discriminatory effects on the complainant, if appropriate.²

Title IX does not require a school division to provide separate grievance procedures for sexual harassment complaints; however, a school division's grievance procedures for handling discrimination complaints must comply with the prompt and equitable requirements of Title IX. If a school uses its student disciplinary procedures to meet its Title IX obligation to resolve complaints of sexual violence promptly and equitably, it should recognize that imposing sanctions against the perpetrator, without additional remedies, likely will not be sufficient to eliminate the hostile environment and prevent recurrence as required by Title IX. School divisions need to ensure that their employees are trained so that they know to report harassment to appropriate school officials, and so that employees with the authority to address harassment know how to respond properly. School divisions should take steps to prevent any retaliation against a student who makes a complaint or any student who provides information regarding the complaint. At a minimum, under Title IX, the division must ensure that complainants and their parents, if appropriate, know how to report any subsequent problems, and should follow up with complainants to determine whether any retaliation or new incidents of harassment have occurred.

Pending the outcome of an investigation, Title IX requires a school division to take steps to protect the complainant from further harassment as necessary, including taking interim steps before the final outcome of the investigation. The school division should undertake these steps

² See OCR's Revised Sexual Harassment Guidance: Harassment of Students by School Employees, other Students or Third Parties (2001)("OCR's 2001 Guidance"). See also OCR's "Dear Colleague Letter," dated April 4, 2011.

promptly once it has notice of a sexual harassment allegation. It should notify the complainant of his or her options to avoid contact with the alleged perpetrator. For instance, the school division may prohibit the alleged perpetrator from having contact with the complainant pending the results of the investigation. When taking steps to separate the complainant and the alleged perpetrator, a school division should minimize the burden on the complainant and thus should not, as a matter of course, remove the complainant from classes while allowing the alleged perpetrator to remain. In addition, school divisions should ensure that complainants are aware of their Title IX rights and any available resources, such as counseling services, and, if appropriate, their right to file a complaint with local law enforcement.

In addition, if there is an incident involving potential criminal conduct, the school division must determine, consistent with state and local law, whether appropriate law enforcement or other authorities should be notified. But a school division's Title IX investigation is different from any law enforcement investigation, and a law enforcement investigation does not relieve a school division of its independent Title IX obligation to investigate the conduct. Although a school division may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, once notified that the police department has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any charges), the school division must promptly resume and complete its fact-finding for the Title IX investigation. Moreover, the criminal investigation should not prevent a school division from notifying complainants of their Title IX rights and the school's grievance procedures, or from taking interim steps to ensure the safety and well-being of the complainant and the community while the law enforcement agency's fact-gathering is in progress. These duties are a school division's responsibility, regardless of whether a student has complained, asked the division to take action, or identified the harassment as a form of discrimination.

Further, a school division should provide training to employees about its grievance procedures and their implementation. A school division should provide such training to any employees likely to witness or receive reports of sexual harassment and violence, including teachers, law enforcement unit employees, administrators, guidance counselors, health personnel, and other employees. A school division needs to ensure that its employees are trained so that they know to report harassment to appropriate officials, and so that employees with the authority to address harassment know how to respond properly.

Section 504/Title II

The regulation implementing Section 504 at 34 C.F.R. §104.4(a), provides that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity operated by a recipient of FFA. Disability harassment can include unwelcome verbal, nonverbal, or physical conduct based on disability. Harassment of a student based on disability that creates a hostile environment that is sufficiently serious so as to deny or limit a student's ability to participate in or to benefit from the services, activities or opportunities offered by a school is a form of disability discrimination prohibited by Section 504 and Title II. In evaluating the seriousness of the conduct, OCR considers all relevant circumstances. Relevant factors include the degree to which the conduct affected one or more students' education; the type, frequency, and duration of the conduct;

the identity of and relationship between the alleged harasser and the subject or subjects of the harassment, the number of individuals involved, the status of the parties (e.g., age, disability, relationship), the size of the school, location of the incidents, and context in which they occurred; and other incidents at the school. Similar to the Title IX context, as described above, in determining whether a hostile environment based on disability exists, the totality of the circumstances in which the behavior occurs is considered, applying common sense and reasonable judgment.

Section 504 and Title II require that once a school has notice (including constructive notice) of possible harassment of students by other students, as alleged in this complaint, it must take prompt and effective steps to determine what occurred and to end any harassment eliminate a hostile environment if one has been created, and prevent harassment from recurring. A school division is not responsible for peer harassment directly, but only if it knew or should have known about the harassment and failed to respond appropriately.

In addition, the regulations implementing Section 504 and Title II establish procedural requirements that are important for the prevention and correction of disability discrimination,³ including harassment. These requirements include adoption and publication of grievance procedures providing for the prompt and equitable resolution of complaints of disability discrimination, including disability harassment. Also, these regulations require that the Division designate at least one individual to coordinate its compliance with Section 504 and Title II.

Findings & Analysis

Title IX

OCR found that the Division did not respond promptly and effectively to the sexual harassment of students, including sexual assaults and other verbal and physical conduct of a sexual nature that resulted in a sexually hostile environment that denies or limits students' ability to participate in or benefit from the Division's education program and activities.

The Division provided OCR with a chart listing incidents for which students were disciplined for engaging in sexual harassment. According to this chart, in the 2011-2012 school year, students were disciplined for engaging in sexual harassment at Division schools in about 100 different incidents, most of which involved inappropriate touching (e.g., making "groin to groin" contact or touching or grabbing others' private parts). For the 2012-2013 school year, the Division provided OCR with 78 different instances where students were disciplined for sexual harassment in the Division schools up to March 2013.⁴ The Division's records are entirely disciplinary. The Division does not maintain records on how it investigated each instance, any remedies that were provided to the victims, or any steps taken to eliminate a hostile environment other than

³ 34 C.F.R. §104.7.

⁴ The Division provided OCR with additional instances of harassment from March 2013 to November 2013 for the six schools where OCR conducted the onsite visits. OCR's review of these additional instances showed that they were similar to the previous instances provided in that they involve mostly inappropriate touching and were recorded in disciplinary records.

discipline, nor does it have any records of complaints that did not result in discipline.

During student focus groups at all six schools, students consistently informed OCR that students frequently touch, slap, and grab their private parts, particularly their buttocks and breasts, while they walk in the hallway, in class, on the school bus, in the cafeteria, in the stairwell, and in most other areas within the schools. Students informed OCR about “National Grab Ass Day” and “National Grab Titties Day,” where students used these “national days” as excuses for grabbing their peers.⁵ Students informed OCR that the grabbing occurs throughout the school year, but is more pervasive on the designated days (which occur multiple times during the year, according to some students). In another example, a middle school student informed OCR that another student pushed his head down toward the student’s crotch as though he was “giving him head.” Students reported that this touching was generally unwelcome. While students clarified that both male and female students are touched, some male students reported that female students asked them to protect them in the hallways to avoid the touching. Many students informed OCR that they did not feel safe traveling in the hallways unless they were with their friends who could protect them. Another student reported that because of all the touching that happens at the bus, her mother does not permit her to take the school bus any longer.

Many students informed OCR that there is a strong “no snitching” culture in the schools, so they do not report these instances to school personnel. Other students informed OCR that teachers know about the harassment but they just “roll their eyes” and turn the other way. Some students reported that school personnel have observed peers slapping their buttocks or engaging in other touching behavior, but have ignored it. Others informed OCR that they have reported incidents of harassment to school personnel and while sometimes those reports result in discipline, they do not end the conduct. A student explained to OCR that harassment is so widespread that he does not believe that teachers are even able to end it.

OCR interviewed administrators at the School (where the underlying harassment allegation allegedly occurred) and at the six additional schools during onsite visits about the documented instances of harassment that the Division provided to OCR. Some school administrators informed OCR that they were aware of incidents where students touched, grabbed and smacked peers’ private parts, including their buttocks and breasts, but that they did not consider these instances to be sexual harassment because they only occurred one time. The Title IX Coordinator informed OCR that she does not have any knowledge of sexual harassment complaints filed with the Division, the Division’s investigations of such complaints, and its responses to the complaints (including whether and how the Division responded).

Section 504

⁵ Some students at one middle school informed OCR of a national sex day where students have sex in the school. Another group of students at that school spoke to OCR about a national hump day. OCR notes that each of these comments was only raised by students in a single focus group, in contrast to the comments described above, which were made in multiple focus groups at multiple schools.

OCR found that the Division did not respond promptly and effectively to the harassment of students with disabilities that resulted in a hostile environment that denies or limits students' ability to participate in or benefit from the Division's education program and activities.

Students from all six schools where OCR conducted student focus groups informed OCR of multiple instances of disability harassment that they either experienced or observed. OCR notes that the Division reported that there were no documented allegations of disability harassment, and that administrators consistently informed OCR that they had never received any reports of disability harassment. Instances of disability harassment described by students include the following:

- In one high school, students informed OCR that peers laugh at and tease special education students during physical education class and in the cafeteria. Other students informed OCR that they have seen a group of students steal candy and money from a student with autism and candy from a deaf student. Some students reported that they see disability harassment every day in the school. A student said school personnel saw these incidents but did not do anything.
- At another high school, students informed OCR that they heard their peers with disabilities called "stupid." They also informed OCR that students make fun of, tease, and laugh at students with autism in the classroom and at lunch.
- In a middle school, students informed OCR that they have seen students teasing students who use wheelchairs by crowding them to prevent them from moving and pressing the buttons on a student's electronic wheelchair. Other students reported that their peers take away students' crutches "to trip them and make them feel pain." A student to whom this happened reported trying repeatedly to tell teachers but they were "too busy" and, eventually, the student had a "mental breakdown." Another student reported that students tease other students with ADHD and say, "that's because you have ADHD because you're mental in the head." Other students informed OCR that a student was bullied for having diabetes and not being able to run in physical education class, this student eventually left the class. Students informed OCR that students start rumors about other students having eating disorders. Students also heard several students make fun of their peers for having a stutter. Most students reported that they see disability harassment every day in the school. Students spoke of reporting such harassment to a teacher or a counselor, and of teachers directly observing the harassment, but the students said that often little or nothing was done.
- In another middle school, students informed OCR that students tease others with autism and call them "stupid." Other students reported that students make fun of peers for having a stutter. A student reported that a student with a disability was thrown down the stairs, and, although a teacher told a security guard, the guard did nothing. Most students informed OCR that teasing of students with disabilities is widespread.

- In a third middle school, students informed OCR that students bully students with autism. Other students heard their peers call special education students “slow.” In one case, a student with autism who was repeatedly teased in class reported this to the teacher, but the teacher “sometimes did not listen.”
- In a fourth middle school, a student informed OCR that students made fun of her because of her disability.

The Section 504 Coordinator is not involved with disability harassment complaints, and informed OCR that such complaints would be handled on the school level, she stated that she does not receive reports of such complaints.

Remedies

To assess the Division’s hostile environment based on sex and disability, OCR considered other information obtained from the Division during the course of the investigation. Specifically, OCR reviewed the Division’s Title IX and Section 504 grievance procedures and the sexual harassment training materials provided to Division personnel. OCR also noted that Division personnel were unaware of the definition of disability harassment, that Division personnel informed OCR that complaints of sexual violence and other types of sexual assaults are matters solely for referral to law enforcement, that most individuals responsible for investigating complaints of sexual harassment had not received any training on this matter, and that the Title IX and Section 504 coordinators were not coordinating the Division’s compliance with Title IX and Section 504.

To address OCR’s findings, OCR entered into the attached Resolution Agreement, which requires the Division to revise its Title IX and Section 504 grievance procedures, develop harassment procedures, ensure that its Title IX and Section 504 coordinators are coordinating the Division’s compliance with Title IX and Section 504, provide comprehensive training and education for Division personnel and students on harassment, assess the school climate, develop a process for tracking complaints of harassment, develop a community and parental task force, develop a student advisory committee, and provide OCR with its responses to complaints peer harassment. OCR will monitor the Division’s compliance with the Agreement, which, when implemented, will end the hostile environment.

Individual Allegation of Harassment

OCR finds that the Division’s investigation the individual allegation of sexual and disability harassment by the Complainant was not prompt and that the Division did not take appropriate interim measures while its investigation was under way. The Division learned of Complainant’s allegation in February 2013, but did not complete its investigation until February 2014. As described above, the Division did not provide interim remedies for alleged victims of sexual violence during the pendency of an investigation.

OCR has also determined that the Division has now responded to this individual allegation. OCR reviewed the Division’s investigative documents, including notes from interviews with

School personnel, the Student, and Student A and the Division's analysis of the information collected. The Division was unable to substantiate the Complainant's allegation of harassment, and OCR determined that the Division's investigative documents and analysis supported this conclusion. On February 21, 2014, the Division sent a letter to the Complainant notifying her of the outcome of its investigation and providing her with an opportunity to appeal this finding.

Allegation 2: During the 2012-2013 school year, the School failed to reevaluate the Student to consider whether there was a significant change in placement when she required daily administration of medication.

Legal Standard

The Section 504 regulation at 34 C.F.R. § 104.33 requires school divisions to provide a free appropriate public education to each qualified individual with a disability in the school division's jurisdiction, regardless of the nature or severity of the individual's disability. The provision of an appropriate education is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met and are based upon adherence to the procedural requirements of Section 504 pertaining to the educational setting, evaluation and placement, and the provision of procedural safeguards. OCR interprets the regulation implementing Title II as imposing substantially similar requirements to those found in the regulation governing Section 504.

The Section 504 regulation at 34 C.F.R. § 104.35 requires a school division to evaluate a student who because of disability needs or is believed to need special education or related services before taking any action with respect to the initial placement of the student in regular or special education and any subsequent significant change in placement. In interpreting evaluation data and in making placement decisions, the school division must draw upon information from a variety of sources, establish procedures to ensure that information obtained from such sources is documented and carefully considered, and ensure that the placement decision is made by a group of persons, including persons knowledgeable about the student, the meaning of the evaluation data, and the placement options. Also, the Section 504 regulation at 34 C.F.R. § 104.36 requires that the school division establish and implement procedural safeguards that include an opportunity for the parents/guardians to request an impartial hearing with respect to actions regarding the identification, evaluation, or placement of students with disabilities. In addition, in the Frequently Asked Questions (the FAQs) of OCR's January 19, 2012 Dear Colleague letter, found at: <http://www.ed.gov/ocr/docs/dcl-504faq-201109.html>, OCR states that implementation of a health plan for a student is insufficient if, in the creation of the health plan, the school division does not comply with the evaluation, placement, and procedural safeguard requirements of the Section 504 regulation.

Factual Background

During the 2011-2012 school year, the Student attended middle school in the Division where she was identified as having multiple disabilities and received educational services under an IEP. Upon her enrollment at the School in December 2012 after a period during which she was not in

a Division school, she continued to be served under the middle school IEP. That IEP did not indicate that she was experiencing any anxiety attacks or otherwise address anxiety. Instead, with regard to behavioral concerns, her middle school IEP documented that the Student “has a history of aggressive behaviors and defiance.”

On December 6, 2012, the Complainant provided the School with a physician’s prescription for anti-anxiety medication and requested that the School nurse administer the Student medication on a daily basis at noon. The School provided the Complainant with a health care plan that essentially memorialized the prescription and included the Student’s diagnosis of anxiety. Although the School then began to administer the medication (and obviously had information about the Student’s condition through the doctor’s diagnosis of anxiety), the School did not convene her IEP team or a team consistent with the Section 504 regulation at 34 CFR 104.35(c) to consider whether there was a need to modify her IEP or to create a separate plan under Section 504.

Despite the School’s creation of the health care plan, the administration of the Student’s medicine was inconsistent. According to the Complainant and to School personnel, the Student did not receive the medication on a daily basis as she often did not go to the nurse to obtain it. School personnel confirmed that the Student was not prompted to take her medication, but was excused from her classes when she chose to go to the nurse. The Complainant reported to OCR that she was concerned that the Student often took the medication at the wrong time of day. OCR’s review of the School nurse’s log of medication administration for the Student supports that on the days that she did receive the medication, she often did not receive it at noon, as prescribed. Instead, she sometimes took the medication as much as an hour earlier or later.

The Student’s anxiety manifested itself soon after her return to the School in December, according to documentation provided by the School. On XXXX, during the Student’s first week at the School, she experienced an anxiety attack that resulted in her removal from the classroom until the attack subsided. On XXXX, the Student’s Case Manager contacted her teachers in an e-mail, advising them to escort the Student to another classroom if her “anxiety, frustration or behavior levels begin to escalate.”

When the School developed a new IEP for the Student, the IEP still did not address these new developments. On XXXX, the School held an IEP meeting to develop a new IEP for the 2013-2014 school year. Though the XXXX IEP acknowledges that the Student’s behaviors include “academic anxiety,” there is no discussion of the Student’s diagnosis of anxiety and whether she is eligible for additional services to address it. There is no mention of her anxiety attacks and the protocols suggested by her Case Manager to teachers for responding to them. The IEP also makes no mention of anti-anxiety medication administration and states “no” under the question of whether the Student has a “chronic health care plan.”

Findings & Analysis

OCR has determined that the School’s limited responses to the Student’s new behavior and diagnosis upon the Student’s re-enrollment in the Division in XXXX did not comply with Section 504. As described above, upon her matriculation to the School in XXXX, the Student

required daily administration of anti-anxiety medication during the School day to assist with her new diagnosis of “anxiety.” The Student also experienced anxiety attacks in December. All of these factors should have indicated to the School on the Student’s return in XXXX that it needed to convene the appropriate team to address her needs for special education and/or related aides and services, yet the School continued her under her middle school IEP that did not address anxiety. A School official memorialized the physician’s prescription for anti-anxiety medication in a health care plan that allowed the School nurse to administer medication to the Student when she chose to report to the School nurse, but the School took no measures to ensure that she did report to the nurse, nor did it respond when she did not do so. A School official also unilaterally determined that the Student should be escorted from her classroom when she experienced anxiety attacks. The School did not, however, consult with a group of knowledgeable persons in making these determinations. Neither her IEP team nor any other group of knowledgeable persons discussed how to respond to her anxiety attacks.

The inadequacy of the health care plan regarding the student’s medication is apparent in several respects. The School did not document the logistics of how to ensure that the Student would be prompted to visit the nurse to take the medication, did not develop a plan to ensure that she take the medication at the designated time of day, and did not provide the Complainant with notice of due process rights. The Special Education Chair informed OCR that she was unsure if a parent could access due process rights in relation to a health care plan, and informed OCR that the designated Section 504 person is the Assistant Principal (AP). However, the AP informed OCR that he has no knowledge of and no involvement with Section 504 issues, he merely forwards referrals to the Special Education Chair. The School’s Special Education Chair also informed OCR that she had no knowledge that the Student was supposed to be receiving daily medication from the nurse, she also stated that the health care plan is “more of a prescription” than a plan. The Section 504 Coordinator stated that she is not involved with medication requests and is not aware of any process in place to address situations where students are not taking their medication. The Student’s Case Manager informed OCR that the health care plan is “not at all” a Section 504 plan. The Division’s attorney stated that “the doctor does the plan, so there is no due process.” He reiterated that the plan is really a prescription from a doctor and the School adopts what the doctor prescribes.

The FAQs advise that “[c]ontinuing with a health plan may not be sufficient if the student needs or is believed to need special education or related services because of his or her disability. The critical question is whether the school division’s actions meet the evaluation, placement and procedural safeguard requires of the FAPE provisions.” The FAQs clarify that “the Section 504 regulation does not set out specific circumstances to trigger the obligation to conduct an evaluation; the decision to conduct an evaluation is governed by the individual circumstances of each case.” In this case, the Division had ample reason to conduct an evaluation based on the new prescription, the information from the doctor and the Student’s behavior at the School. OCR notes that the Complainant had concerns about the process for prompting the Student to take her medication, administering medication at the correct time of day, ensuring that the Student takes her medication daily, and responding to her anxiety attacks. These concerns are the type of issues that should be contemplated by a group of knowledgeable persons in determining whether a student’s health impairment impacts a major life activity, how to coordinate the administration of medication, and how to respond to anxiety attacks. Even when the Student did not report to

the nurse to take her medication, failed to take the medication at the correct time, and experienced anxiety attacks in the School, the Division did not consider whether the process it had established for the Student needed to be changed.

For all these reasons, OCR determined that although the School provided the Student with a health care plan, it did not follow the procedural requirements under Section 504 to determine whether the Student was eligible for different or additional special education or related aids and services given her anxiety diagnosis and her change in behavior.

OCR also identified concerns with the Division's general evaluation process for students with serious health conditions. The Division's Guide to Section 504 (the Guide) states that "[s]tudents who are making honor roll or are making mostly As and Bs are not being significantly impacted in their learning. Further, if a student is passing from grade to grade with his/her peers, he/she is considered to be receiving educational benefit and is likely not eligible for Section 504 accommodations." The Principal reiterated this statement when he informed OCR that students with medical issues are not evaluated as long as they are "functioning at a level that they should be academically and socially." When given the example of a student with diabetes, the Special Education Chair said that if that student has a health care plan for diabetes that does not mean that the student is considered to have a disability. This policy does not comply with Section 504, which requires the Division to identify and evaluate all students who need or are believed to need special education and related aids and services (which can include the administration of medication) regardless of their academic performance.⁶

Conclusion

On April 11, 2014, the Division entered into a Resolution Agreement to resolve the compliance concerns identified. OCR will monitor the Division's compliance with the Agreement.

This letter of findings should not be construed as covering any other issues regarding compliance with Title IX, Section 504, and Title II that may exist and are not addressed herein. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

OCR routinely advises recipients of Federal funds and public education entities that Federal regulations prohibit intimidation of, harassment of, or retaliation against those filing complaints with OCR and those participating in the complaint resolution process. Complainants and participants who feel that such actions have occurred may file a separate complaint with OCR.

⁶ The FAQs state that, "[s]chool districts should not assume that [a] student's academic success necessarily means that the student is not substantially limited in a major life activity and therefore is not a person with a disability. . . Thus, grades alone are an insufficient basis upon which to determine whether a student has a disability. Moreover, they may not be the determinative factor in deciding whether a student with a disability needs special education or related aids or services. Grades are just one consideration and do not provide information on how much effort or how many outside resources are required for the student to achieve those grades."

Also, under the Freedom of Information Act, OCR may need to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect, to the extent provided by law, personal information that, if released, could constitute an unwarranted invasion of privacy.

If you have any questions, please contact Kay Bhagat at 202-453-6598 or Kay.Bhagat@ed.gov or Tracey Solomon at 202-453-5930 or Tracey.Solomon@ed.gov.

Sincerely,

/S/

Alice B. Wender
Director
District of Columbia Office
Office for Civil Rights

Enclosure (Resolution Agreement)

Cc Bernard Pishko, Esq. (sent via e-mail)
Derek Mungo, Esq. (sent via e-mail)