



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

400 MARYLAND AVENUE, SW  
WASHINGTON, DC 20202-1475

REGION XI  
NORTH CAROLINA  
SOUTH CAROLINA  
VIRGINIA  
WASHINGTON, D.C.

December 10, 2014

Via Electronic Mail

Dr. Julie Jailall, Executive Director  
Neuse Charter School  
909 Booker Dairy Road  
Smithfield, North Carolina 27577

Re: OCR Complaint No. 11-14-1249  
Resolution Letter

Dear Dr. Jailall:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of the above-referenced complaint filed against Neuse Charter School (the School). The Complainant alleged that the School discriminated against the Student on the basis of disability. Specifically, the complaint alleged that the School failed to provide the Student a free and appropriate public education during the 2013-14 school year by: not determining the Student's eligibility under Section 504; not developing a Section 504 plan in a timely manner; and XXXX.

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

OCR reviewed documents provided by the Complainant and the School and interviewed School staff. This letter summarizes the facts and conclusions found by OCR during its investigation and resolution of this complaint. Based on the investigation, OCR determined that the School failed to comply with the Section 504 regulations with regard to the complaint allegations. Our findings are further explained below.

**Facts**

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

The School is a public charter school in North Carolina that opened on 2007. The Student started at the School in XXXX and had an Individualized Education Program (IEP) at the School for speech and language services. The Student was diagnosed with XXXX. In Summer 2012, the Complainant requested additional services for the Student for XXXX, but the School determined that he was not eligible under the Individuals with Disabilities Education Act (IDEA) for the Specific Learning Disability category. In January 2013, the School re-evaluated the Student for XXXX and found him no longer eligible, so his IEP was terminated.

During the 2013-14 school year, the Student was in XXXX. In early Fall 2013, the Complainant requested further consideration for special education based on the Student's XXXX. The Complainant submitted a private psychological evaluation conducted on XXXX to the School, which indicated that the Student had a disorder of XXXX based on DSM-IV guidelines and had indications of a XXXX. On XXXX, the School's IEP team found the Student ineligible for special education, even though he met the criteria of one or more of the listed disabling conditions, because it determined that there was no adverse effect and the Student did not require specially designed instruction. The IEP meeting notes also reported: "A 504 was also mentioned as an option possibility but also using a 504 accommodations list to see what is available;" that School personnel would meet with the Complainant "to discuss a 504 plan;" and that the team "agreed that classroom interventions will possibly help him with organization and a 504 plan will be pursued."

After the IEP ineligibility determination, one of the School's principals met with the Complainant on XXXX to discuss strategies that could assist the Student in his classes. The Complainant and the principal created handwritten lists and notes of possible strategies, such as seating location, < XXXX SENTENCE REDACTED XXXX >. The School did not have documentation about how any of the strategies discussed were implemented in any class.

<XXXX 3 PARAGRAPHS REDACTED XXXX>

### **Legal Standards**

The regulation implementing Section 504 provides, at 34 C.F.R. § 104.33(a) and (b), that a recipient that operates a public elementary or secondary education program or activity shall provide a FAPE to each qualified student with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of a student's disability. The provision of an appropriate education is defined in the regulation as 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. The Section 504 regulation, at § 104.35(a) and (b), also requires schools to have standards and procedures for the evaluation of students who, because of disability, need or are believed to need special instruction or related services, as well as to conduct such evaluations. Appendix A to 34 C.F.R. Part 104 states that, except in extraordinary circumstances, OCR does not review the results of individual

placement and other educational decisions as long as the school has complied with Section 504 procedural requirements with respect to identification and location, evaluation, and due process. However, procedural inadequacies that result in the loss of educational opportunity constitute a denial of FAPE. Per § 104.36, compliance with the IDEA’s procedural safeguards is one means of meeting Section 504’s procedural safeguards.

A Section 504 evaluation determines if a student is a qualified individual with a disability entitled to services. The Section 504 regulation, at 34 C.F.R. § 104.3(j), defines a disability as a physical or mental impairment that substantially limits one or more major life activities<sup>1</sup>; the regulation implementing ADA Title II, at 28 C.F.R. § 35.104, provides the same definition.<sup>2</sup> ADA Title II does not have any specific provisions regarding FAPE, but it does prohibit discrimination against qualified individuals with disabilities by public entities. The ADA Title II regulation states, at 28 C.F.R. § 35.103, that it does not set a lesser standard than those under Section 504. Accordingly, OCR interprets the ADA Title II regulation to require public schools to provide FAPE to the same extent as required under the Section 504 regulation.<sup>3</sup>

## **Analysis**

The School does not have written Section 504 policies and procedures for identifying and serving students with disabilities, but it does have forms for: identification under Section 504; a Section 504 accommodation plan; and Section 504 plan review. The School’s elementary guidance counselor (who is the School’s designated Section 504 coordinator) told OCR that the School’s practice is to use the Student Assistance Team (SAT) referral process to address the needs of students, including those who might have disabilities. The SAT process generally takes four to six weeks for staff to try classroom interventions and conduct observation before the SAT decides to continue or revise the interventions or to refer a student for a formal special education evaluation. The SAT process does not include consideration under Section 504. The guidance counselor

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<sup>1</sup> In addition to having an actual disability, the definition of a person with a disability includes having a record of such an impairment or being regarded as having such an impairment.

<sup>2</sup> The Americans with Disabilities Act Amendments Act (ADAAA), which became effective January 1, 2009, amended the ADA and included a conforming amendment to Section 504 that affects the meaning of the term “disability.” The ADAAA retains the same disability definition but emphasizes that the definition should be broadly construed. The ADAAA provides a more extensive list of activities that can be considered to be major life activities, to include: caring for one’s self, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working, as well as the operation of major bodily functions such as the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The ADAAA also directs that the ameliorating effects of mitigating measures used by an individual generally not be considered in a disability determination. See OCR’s 2012 Dear Colleague Letter on the ADAAA, which is available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201109.pdf> (Jan. 19, 2012); see also OCR’s “Protecting Students with Disabilities: Frequently Asked Questions” publication, available at: <http://www.ed.gov/about/offices/list/ocr/504faq.html>.

<sup>3</sup> The Section 504 and Title II requirements apply to public charter schools as they do to all public school systems and institutions. See OCR’s 2014 Dear Colleague Letter on charter schools, which is available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405-charter.pdf> (May 14, 2014).

explained to OCR that she and the School believe that state policies require special education evaluation first, and if a student does not qualify under IDEA, then they can consider the student for Section 504 eligibility if the student has an impairment that substantially limits a major life activity. If a student has a medical condition that does not affect the ability to learn, the School addresses the student's medical needs through a health plan.

The School's Section 504 forms reference correct definitions of major life activities and substantial impairment for disability determination purposes. The School currently has XXXX students who have Section 504 plans.

*Section 504 eligibility and development of a Section 504 plan:*

The Complainant asserted that the School failed to determine the Student's eligibility under Section 504 during the 2013-14 school year and thus did not develop a Section 504 plan in a timely manner. The School did not initiate any Section 504 process for the Student until XXXX when it sent his parents an invitation to a Section 504 meeting to discuss Section 504 evaluation and eligibility. The School claimed that it did not conduct a formal Section 504 evaluation and complete its Section 504 forms for the Student because at the end of November 2013 and into the Spring 2014 it did not have reason to believe that he needed special instruction or related services. The Student did not have problems in any class other than XXXX. School staff indicated that, although Section 504 was raised as an option after the Student was found ineligible under the IDEA, only at the end of the school year after the Student failed the XXXX was there any indication that the Student might have a disability under Section 504. They said that observations and classwork showed that the Student could do his XXXX.

However, there was evidence that in November 2013, School staff thought that the Student's XXXX was working because he did his work and got average grade; this disregards the amended ADA's instruction to determine disability without regard to mitigating measures. The Student's Fall 2013 private evaluation information also put the School on notice that he had a XXXX. There also was evidence that the Student had XXXX.

<XXXX 2 PARAGRAPHS REDACTED XXXX>

Based on the above information, OCR noted concerns regarding the School's compliance with Section 504's procedural requirements when it failed to evaluate the Student under Section 504 during the 2013-14 school year. OCR also had concerns that the School's lack of written Section 504 procedures contributed to the failure to evaluate the Student.

<XXXX 4 PARAGRAPHS REDACTED XXXX>.

**Conclusion**

OCR discussed the concerns identified above with the School and, in response, the School signed a resolution agreement (copy enclosed), which, when fully implemented, will resolve the complaint. The provisions of the agreement are aligned with the allegations raised in the complaint and information obtained during the course of OCR's investigation, and are consistent with the applicable regulations. OCR will monitor the School's implementation of the agreement. If the School fails to implement the resolution agreement, OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of the agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings to enforce the resolution agreement, OCR shall give the School written notice of the alleged breach and a minimum of sixty calendar days to cure the alleged breach.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the School's compliance with any other regulatory provision or to address any issues other than those addressed in this letter.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. Complainants may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the School may not retaliate against an individual who asserts a right or privilege under a law enforced by OCR or who files a complaint, testifies, or participates in an OCR proceeding. If this happens, the individual may file a retaliation complaint with OCR. Also, 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 appreciated your cooperation during the investigation and we look forward to working with you during monitoring. If you have any questions, feel free to contact Kristi Bleyer, the OCR attorney assigned to this complaint, at (202) 453-5901 or [Kristi.bleyer@ed.gov](mailto:Kristi.bleyer@ed.gov).

Sincerely,

/S/

Dale Rhines  
Acting Team Leader, Team IV  
District of Columbia Office  
Office for Civil Rights