



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, DC

September 30, 2016

Dr. Jesse Washington, III
Superintendent
Orangeburg Consolidated School District Five
578 Ellis Avenue
Orangeburg, South Carolina 29115

Re: OCR Complaint No. 11-16-1281
Resolution Letter

Dear Dr. Washington:

This letter is to advise you of the outcome of the complaint that the Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) received on April 6, 2016, against Orangeburg Consolidated School District Five (the District). The complaint was filed on behalf of a student (the Student) at XXXX School (the School). The Complainant alleges that the District discriminated against the Student on the basis of disability.

The specific allegations are as follow:

Allegation 1: The District treated the Student differently on the basis of disability by failing to provide timely written notice to the Complainant that the Student was suspended for three days beginning XXXX; and

Allegation 2: The District denied the Student a free appropriate public education (FAPE) when it failed to evaluate the Student for eligibility under Section 504 during the 2015-2016 school year.

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

Before OCR completed its investigation, the District expressed a willingness to resolve the complaint by taking the steps set forth in the enclosed Resolution Agreement. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Resolution Agreement.

Factual Background

During the 2015-2016 school year, the Student, who has <XXXX SENTENCE REDACTED XXXX> The Student had several behavior incidents during the school year. At the School's request, the Complainant met with the Principal, the XXXX to discuss the Student's behavior. Together they developed strategies and interventions designed to prevent further misbehavior, including that the assignment of an individual who the Student could go to when upset and who would help him calm down and return to class.

<XXXX 2 PARAGRAPHS REDACTED XXXX>

The Complainant went to School and after meeting at length with the Principal, she was given the green "Advisor's Copy" of the Student's discipline referral form. It reflected that the Student had engaged in XXXX.

On XXXX staff who had asked him to move and touched him when he failed to do so) that resulted in a recommendation for expulsion. When notified of the recommendation, the Complainant spoke with the Principal, objected to the fact that a manifestation determination review had not been conducted, and requested that the Student be allowed to complete the school year on an abbreviated schedule. After checking into the matter, the Principal advised the Complainant that the Student did not have a Section 504 plan. Following a meeting with District staff, the Complainant was informed that the Student would be allowed to attend school on an abbreviated schedule (attending school in the morning until 11:30 a.m.) for the remainder of the school year.

For the current school year, the Complainant enrolled the Student in a local charter school unaffiliated with the District.

Legal Standards

Allegation One: Disability Discrimination – Different Treatment

The Section 504 regulation, at 34 C.F.R. § 104.4, and the Title II regulation, at 28 C.F.R. § 35.130(a), provide that no qualified individual with a disability shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under the District's programs or activities on the basis of disability. When investigating an allegation of different treatment, OCR first determines whether there is sufficient evidence to establish an initial, or prima facie, case of discrimination. Specifically, OCR determines whether the school treated the student less favorably than similarly situated individuals without disabilities. If so, OCR then determines whether the school had a legitimate, nondiscriminatory reason for the

different treatment. Finally, OCR determines whether the reason given by the school is a pretext, or excuse, for unlawful discrimination.

The Complainant claims that the Student was treated differently based on disability when School staff did not immediately provide her with written notice that the Student had been suspended following an incident on March 24th. According to the Complainant, School staff intentionally failed to provide her with written notice until 13 days after the suspension because the Student has XXXX and because “certain school officials don’t particularly like him.” She notes that the failure to provide her written notice of the suspension until 13 days later is inconsistent with the District’s own discipline policy. She points to the Code of Conduct which specifically provides:

Once a student is suspended from school, the principal shall notify in writing the parent/guardian of the student, giving the reason for such suspension and setting a time and place when the principal will be available for a conference with the parent/guardian. The conference shall be set within three days of the date of suspension.

The Complainant maintains the failure of School staff to follow the District’s own policy is indicative of discriminatory different treatment of the Student due to his disability.

As discussed more fully below, at the time the Student was suspended on March 24th he was not recognized by School staff as a student with a disability; nonetheless, OCR considered whether the District had any explanation for not immediately providing written notice of his suspension to the Complainant on that day and found that it did.

The Assistant Principal acknowledged that the delay in providing written notice of the suspension to the Complainant should not have occurred. She said, however, that the failure to provide written notice to the Complainant on the day of the incident was inadvertent. The Assistant Principal told OCR that while talking with the Complainant on XXXX about the incident she said she would leave the written referral at the front desk for her to pick up. The Assistant Principal said she advised the front desk receptionist of this as well. The Assistant Principal then left to attend a meeting. However, because there had been a change in front desk personnel before the Student’s grandmother came to pick up the Student, a different receptionist was present at the time the grandmother’s arrival and did not know to provide the written notice to the grandmother.

OCR next considered whether there was any indication that the reason given was a pretext for discrimination and found none. OCR notes that the Assistant Principal’s candor in acknowledging the mistake supports the claim of inadvertence. In addition, the fact that the Complainant’s claim is limited to one occurrence does not suggest that the Assistant Principal had a history of treating the Student differently or with animosity. There is no indication that similar oversights occurred with regard to the Student or any other student. Finally, the fact that Assistant Principal completed the written discipline referral form consistent with District policy and took steps to make it available to the Student’s parent/grandparent on the day of the incident further supports that the resulting failure of School personnel to deliver it to the Student’s parent/grandparent was inadvertent. Consequently OCR finds insufficient evidence to support

the Complainant's claim that the District treated the Student differently on the basis of disability by failing to provide timely written notice to the Complainant that the Student was suspended for three days beginning XXXX.

Allegation Two: Disability Discrimination – Denial of FAPE

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free appropriate public education (FAPE) to students with disabilities. An appropriate education is regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are developed in compliance with Section 504's procedural requirements. The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a school district to evaluate any student who needs or is believed to need special education or related services due to a disability. A district must conduct an evaluation before initially placing the student in regular or special education and before any subsequent significant change in placement.

The Complainant told OCR that the Student was diagnosed with XXXX during the summer of XXXX and that she provided medical documentation of the Student's XXXX to School staff shortly thereafter. She also noted that School staff administered his medication to him for a short time at the start of the 2014-2015 school year. Although in XXXX the Complainant began giving the Student his medication at home prior to School, she continued to provide school staff with a supply of medication in the event that he forgot to take it before arriving, which occurred on a few occasions.

The Complainant acknowledges that the Student engaged in misconduct at school including during the 2015-2016 school year. She said she was invited by the School's guidance counselor to meet with the counselor, the principal, and school psychologist in XXXX to discuss the Student's behaviors. According to the Complainant, at the meeting they agreed that staff would be advised not to "get in his face" when redirecting the Student and identified a particular staff person who he could go to cool down if he got agitated. She told OCR that while they agreed that school staff would complete worksheets reflecting what the Student did well and what he needed to work on she received them for only one or two weeks following the December meeting. She recalled being told at some point by District staff that the Student did not meet the criteria for a learning disability because there was no problem with his grades. Nonetheless, the Complainant assumed that because she provided documentation of the XXXX, which teachers acknowledged, had met with School staff to discuss and address the Student's impulse control issues, and agreed upon steps taken to assist the Student with his behavior that the Student had a Section 504 plan. She said it was not until May when she questioned why the Student was being recommended for expulsion without a manifestation determination hearing that she became aware through the Principal that the Student did not have a 504 Plan.

School staff interviewed were aware of the XXXX and that during the 2015-2016 school year the Student had engaged in acts of defiance, angry outbursts, tearing up papers, failure to follow directions, and use of rude and profane language that led to his being referred for discipline. They acknowledged that his behaviors got worse as the school year progressed. Staff members indicated they were unsure whether and, if so, when the Student had been evaluated for

eligibility under the Individuals with Disabilities Education Act (IDEA) or Section 504. Some staff indicated that they had not received any formal training regarding identification and evaluation of students who may have a disability. To resolve the complaint, the District voluntarily agreed to evaluate the Student for eligibility under Section 504, determine whether the Student is entitled to any compensatory and/or remedial services, and to provide Section 504 training to relevant School personnel.

Conclusion

Pursuant to Section 302 of OCR's *Case Processing Manual*, the District signed the enclosed Resolution Agreement on September 29, 2016 which, when fully implemented, will resolve the second allegation raised in this complaint. The provisions of the Agreement are aligned with the allegation and issues raised by the Complainant and the information discussed above that was obtained during OCR's investigation, and are consistent with applicable law and regulation. OCR will monitor the District's implementation of the Agreement until the District is in compliance with the statute and regulation at issue in the case. Failure to implement the Agreement could result in OCR reopening the complaint.

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

Please be advised that the District 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, or participates in an OCR proceeding. 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 the cooperation of District staff as well as the assistance of Ms. Connie Jackson, legal counsel to the District, in the resolution of this complaint. If you have any questions regarding this letter, please contact Deborah Kelly, the OCR investigator assigned to this complaint, at 202-453-5919 or deborah.kelly@ed.gov or Betsy Trice, OCR attorney, at betsy.trice@ed.gov or by telephone at (202) 453-5931.

Sincerely,

/S/

Michael S. Hing
Supervisory Attorney, Team 1
District of Columbia Office
Office for Civil Rights

Enclosure

cc: XXXX