



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

March 1, 2017

Dr. Steven Lockard
Interim Superintendent
Fairfax County Public Schools
8115 Gatehouse Road
Falls Church, VA 22042

RE: OCR Complaint No. 11-16-1331
Letter of Findings

Dear Dr. Lockard:

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 XXXX against Fairfax County Public Schools (the Division). The Complainants¹ alleges that the Division discriminated against the Student on the basis of disability and retaliation. Specifically, the complaint alleges the following:

1. The Division retaliated against the Student when Parent 2 brought a special education attorney to a special education meeting on XXXX when:
 - a. At the XXXX meeting, School staff did not allow the Student's family and the attorney to meaningfully participate in the meeting;
 - b. At the XXXX meeting, School staff determined that they would not evaluate the Student regarding his XXXX;
 - c. On XXXX, School staff advised Parent 1 and Parent 2 not to attend a Section 504 meeting; and,
 - d. School staff did not allow the Student XXXX.
2. The Division discriminated against the Student based on disability by failing to provide him a free appropriate public education (FAPE) when School staff conducted a Section 504 meeting on XXXX without including a group of persons knowledgeable about the Student.
3. The Division discriminated against the Student based on disability by failing to provide him a FAPE during the XXXX school year by:

¹ While the complaint was filed by one parent of the Student (Parent 1), the initial interview and additional information was provided by the Student's other parent (Parent 2) and both of the Student's parents participated actively in the investigation. Therefore, where appropriate, OCR will refer to both parents as "the Complainants" throughout the document.

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

- a. Failing to timely evaluate the Student after School staff was notified of the Student’s XXXX disability on XXXX;
 - b. Failing to implement the Student’s XXXX Section 504 Plan related to extended time and modifications of reduced assignments; and,
 - c. Failing to provide accommodations for the XXXX Standards of Learning tests.
4. The Division discriminated against the Student based on disability in XXXX, by requiring the Student to 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 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. The laws enforced by OCR prohibit retaliation against any individual who asserts rights or privileges under these laws or who files a complaint, testifies, or participates in an OCR proceeding. 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 Complainants and the Division, and interviewed the Complainants and Division staff.

OCR found a compliance concern with respect to Allegation 3(a). In addition, before OCR completed its investigation, the Division expressed a willingness to resolve Allegation 2. The Division agreed to resolve the concerns through the enclosed resolution agreement. However, OCR found insufficient evidence to support Allegations 1, 3(b)-(c), and 4. OCR’s findings and conclusions are discussed below.

Background

The Student was enrolled in the XXXX grade during the XXXX school year. He had a Section 504 plan that provided for related aids and services during the school year, and also XXXX. Upon entering the XXXX grade, the Student’s Section 504 Plan, dated XXXX, included the following related aids and services: XXXX SENTENCE REDACTED XXXX. On XXXX, a reevaluation meeting was held, and the Student’s Section 504 Plan was renewed, without change. On XXXX, another Section 504 meeting was held and a new Section 504 Plan was developed, to XXXX. Neither the Complainants nor the Student attended the XXXX Section 504 meeting. The Complainants confirmed that the Student, being unable to complete all of his standardized testing and coursework, did not XXXX.

Allegation 1

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.61, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Section 504 or who files a complaint, testifies, or participates in an OCR proceeding.

When analyzing a claim of retaliation, OCR will look at: 1) whether the complainant engaged in a protected activity (e.g., filed a complaint or asserted a right under a law OCR enforces); 2) whether the Division took an adverse action against the complainant; and 3) whether there is a causal connection between the protected activity and the adverse action. If all these elements are present, this establishes an initial, or prima facie, case of retaliation. OCR then determines whether the Division has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the Division's reason for its action is a pretext, or excuse, for unlawful retaliation.

Analysis

Allegation 1(a)

As an initial matter, OCR first looked to determine whether the Complainants engaged in a protected activity, and finds that the bringing of a special education attorney to a meeting constitutes a protected activity. OCR next investigated whether the Division took an adverse action against the Student. The Complainants alleged that during an XXXX. Parent 2 or the special education attorney to speak XXXX impacting the Complainants' ability to advocate on behalf of the Student.

The Division disputes that Parent 2 and the attorney were not allowed to meaningfully participate in the meeting. OCR interviewed three Division staff members who attended the XXXX meeting, in particular, the XXXX. All XXXX reported to OCR that Parent 2 and the attorney actively participated in the meeting by discussing the Student's XXXX. XXXX 2 SENTENCES REDACTED XXXX. In addition, the XXXX who was present for the entire meeting, told OCR that no one was trying to exclude Parent 2 or the special education attorney from participating in the meeting.

OCR also reviewed documents provided by the Complainants and the Division. OCR first reviewed the XXXX Report, dated XXXX. The XXXX Report includes: XXXX SENTENCE REDACTED XXXX. It also includes, XXXX SENTENCE REDACTED XXXX. OCR also reviewed a document the Complainants submitted after the XXXX meeting, titled XXXX. In the document, Parent 2 wrote, XXXX. Parent 2 additionally wrote that the XXXX.

Finally, OCR reviewed emails submitted by the Division, a number of which show that Division staff were responsive to the issues raised by Parent 2 and the attorney during the XXXX meeting. OCR reviewed emails sent on XXXX in which Division staff XXXX for the following week XXXX. OCR also reviewed an XXXX email from the XXXX to Division staff, about the importance of having the Student XXXX. In addition, on XXXX.

Based on the above, OCR finds insufficient evidence to support the allegation that Parent 2 and the attorney were prevented from meaningfully participating in the XXXX meeting. Division staff reported that Parent 2 and the attorney participated and that Division staff did not try to exclude their participation; in addition, the XXXX report from the meeting reflects that they were able to express their concerns, including that his XXXX. Further, Division staff immediately followed up XXXX. For these reasons, OCR finds insufficient evidence that the alleged adverse action occurred, and, therefore, finds insufficient evidence of a violation of Section 504 or Title II regarding this allegation.

Allegation 1(b)

The Complainants alleged that they requested special education services for the Student to address XXXX issues and School staff retaliated against the Student by refusing to evaluate him for those services.² Specifically, the Complainants alleged that much of the Student's school work XXXX. The Complainants told OCR that, despite asking for help XXXX. As with Allegation 1(a), OCR finds that the Complainants engaged in a protected activity. OCR next considers whether the Division took an adverse action against the Student, and whether there is some evidence that the action is causally connected to the protected activity. OCR finds that the denial of an evaluation regarding XXXX is an adverse action, and as it XXXX there is some evidence of a causal connection. Therefore, OCR finds there to be a prima facie case of retaliation.

Next, OCR considered whether the Division articulated a legitimate, non-retaliatory reason for its action. The Division stated that the Student was not evaluated for special education services regarding his XXXX because the XXXX members who met and discussed the Student determined that further evaluation was not necessary. Division staff noted that the Complainants raised a number of concerns to the XXXX including the XXXX. The XXXX discussed the concerns and focused primarily on determining whether a special education evaluation, under IDEA, was warranted. Ultimately, because the Student already had a Section 504 Plan in place, the XXXX determined that the Student's XXXX could be met through his Section 504 Plan. The Division additionally articulated that the consensus at the XXXX meeting was that there was not sufficient evidence to warrant an evaluation for special education regarding any XXXX, despite the Complainants' disagreement, and that the Section 504 committee would XXXX. Based on this, OCR found that the Division articulated a legitimate, non-retaliatory reason for its actions.

Next, OCR examined whether the Division's reason for its action is a pretext for unlawful retaliation. First, OCR interviewed Division staff about the decision not to further evaluate the Student for special education services regarding XXXX. XXXX explained to OCR that the purpose of an XXXX meeting is to XXXX, the type of disability, and if the student qualifies for a Section 504 Plan, XXXX. If a child is found eligible for a Section 504 Plan, then a Section 504 meeting would be scheduled.

OCR spoke to School staff who participated in the XXXX meeting, namely the XXXX. XXXX stated that he did not believe that the Student needed special education testing regarding his

² The Complainants told OCR that they raised the denial of a special education evaluation XXXX.

XXXX based, in part, on XXXX. XXXX stated that she believed that there was insufficient documentation of the Student's XXXX and that the Student's Section 504 Plan was sufficient for him. She told staff that a 504 meeting was scheduled XXXX determine whether the Section 504 Plan XXXX.

OCR reviewed the XXXX Report, which indicates that the attorney mentioned that the Student XXXX. However, according to the report, the XXXX considered whether the Student should be evaluated for special education services, but ultimately determined XXXX. Immediately after the XXXX meeting ended, Division staff XXXX. An XXXX was invited to and attended the XXXX Section 504 meeting, and the Section 504 Plan developed at that meeting addressed XXXX. OCR reviewed that plan, which stated that the XXXX. Further, the Division convened yet another XXXX meeting later that month, on XXXX in which the XXXX reviewed additional XXXX documentation provided by XXXX, and found at that time that there was sufficient evidence at that point to warrant an evaluation for special education regarding the XXXX.

OCR found that the Division's legitimate non-retaliatory reason was corroborated by statements of staff and the XXXX meeting notes. For these reasons, OCR finds insufficient evidence that the Division's articulated non-retaliatory reason for determining at the XXXX meeting that it would not evaluate the Student regarding his XXXX was a pretext for retaliation.³

Allegation 1(c)

As with Allegation 1(a), OCR finds that the Complainants engaged in a protected activity. OCR next turns to whether the Division took an adverse action against the Complainants or the Student, and whether that action is causally connected to the protected activity. The Complainants alleged that Division staff told Parent 2 not to attend the XXXX Section 504 meeting in retaliation for XXXX meeting. Specifically, Parent 2 told OCR that XXXX wrote in emails that XXXX. Parent 2 also alleged that the Division's XXXX advised Parent 2 not to attend the meeting XXXX.⁴

The Division denied that staff retaliated against the Student by telling Parent 2 not to attend the Section 504 meeting. As a preliminary matter, OCR could not substantiate that XXXX advised Parent 2 not to attend the Section 504 meeting. OCR spoke to XXXX, and she denied that she told Parent 2 not to attend the Section 504 meeting. OCR also reviewed the email XXXX sent to Parent 2 on XXXX which states: XXXX 2 SENTENCES REDACTED XXXX. OCR also reviewed emails from Division staff, including the Student's XXXX to attend the Section 504 meeting, for various reasons, XXXX. In addition, OCR reviewed the language of that email and notes that OCR cannot infer from this email communication that XXXX advised Parent 2 not to attend the meeting. OCR cannot find, based on a review of these communications, that School staff advised the Complainants not to attend the meeting.

³ OCR addresses, in Allegation 3(a) whether the Division discriminated against the Student by failing to evaluate the Student for XXXX.

⁴ Parent 2 also alleged that XXXX the Complainants from attending during XXXX 2 SENTENCES REDACTED XXXX. As the Complainants did not allege that XXXX told Parent 2 to not attend, OCR did not investigate this claim.

Next, OCR also interviewed XXXX, who reported having a conversation with Parent 2 prior to the Section 504 meeting, but stated XXXX. Rather, he reported that Parent 2 XXXX that might help the Student. He reported telling Parent 2 that if Parent 2 chose to XXXX.

Finally, OCR reviewed an email Parent 2 sent to Division staff (including the counselor, XXXX, and the Principal) on XXXX.:

XXXX PARAGRAPH REDACTED XXXX

Based on the above, OCR finds insufficient evidence to support the Complainants' assertion that they were advised not to attend the Section 504 meeting on XXXX. First, all staff interviewed by OCR denied advising the Complainants regarding their attendance at the meeting. Further, Parent 2's XXXX, and corroborated a Division staff member's account of why Parent 2 did not attend. Of note, Parent 2's XXXX email indicates the reasons Parent 2 decided not to attend the meeting, including that Parent 2 XXXX. Furthermore, OCR's review of the record also shows that a subsequent XXXX meeting was held on XXXX in which Parent 2 attended, and a subsequent Section 504 meeting was scheduled for XXXX.

Allegation 1(d)

The Complainants alleged that the Section 504 committee offered the Student a XXXX rather than providing him accommodations that would allow him XXXX, in retaliation for Parent 2 bringing a special education attorney to the XXXX meeting. Parent 2 also told OCR that she requested the Student be permitted to participate XXXX.

As with Allegation 1(a), OCR finds that the Complainants engaged in a protected activity. OCR also finds that not allowing the Student XXXX is an adverse action, and that there is some evidence of a causal connection to the protected activity, XXXX after the XXXX meeting.

Next, OCR investigated whether the Division articulated a legitimate, non-retaliatory reason for its action. The Division denied having retaliated against the Student as alleged and asserted that the Student XXXX. The Division reported to OCR that it made numerous efforts to provide the Student XXXX. The Division additionally articulated that the Complainants declined the option XXXX, and ultimately, the Student was XXXX. OCR finds the Division has articulated a legitimate, non-retaliatory reason for not allowing the Student XXXX.

Finally, OCR examined whether the Division's reason for not allowing the Student XXXX is pretext for unlawful retaliation. OCR reviewed Division policies and emails from Division staff, as well as interviewed Division personnel. OCR also reviewed Division's XXXX. OCR additionally reviewed a number of emails and letters from as early as XXXX in which Division staff wrote to Parent 2, reminding the Complainants of XXXX,⁵. For example, on XXXX, wrote:

XXXX 2 SENTENCES REDACTED XXXX

⁵ The Counselor wrote, XXXX 2 SENTENCES REDACTED XXXX

Division emails show Division staff continued to communicate XXXX. Of note, on XXXX, the XXXX emailed Division staff, writing “I need to work with this family closely to give them the most accurate information about XXXX.” On XXXX, emailed the XXXX, explaining that the Student could XXXX:

XXXX PARAGRAPH REDACTED XXXX

On XXXX, the XXXX wrote to a XXXX that she had registered the Student for XXXX. However on XXXX, the Parent 2 wrote to Division staff that the Student was XXXX during the XXXX. Finally, OCR reviewed a XXXX email from XXXX to Parent 2 indicating that as the Student did not attend the XXXX.

Based on the above, OCR finds insufficient evidence that the Division’s articulated non-retaliatory reason for not allowing the Student XXXX is a pretext for unlawful retaliation. OCR reviewed communications both before and after the XXXX meeting in which Division staff articulated XXXX, and the possible options for the Student should he fail to complete XXXX. In addition, as discussed in more detail below under Allegation 3,⁶ the Division worked to implement the Student’s Section 504 Plan, therefore providing him with an XXXX. As the Student was unable to XXXX. For these reasons, OCR finds insufficient evidence that the Division retaliated against the Student by not allowing the Student XXXX.

Allegations 2-3

Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide 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. OCR has determined that implementing an appropriately developed Section 504 Plan 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 a FAPE to the same extent required under the Section 504 regulation.

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 Section 504 regulation, at 34 C.F.R. § 104.35(d), also requires a school district to periodically reevaluate a student who has been provided special education or related services. When there is information suggesting that a student’s educational program is not meeting the student’s individual needs, such as a significant decline in the student’s grades or behavior, a group of knowledgeable

⁶ As discussed below under Allegation 3(b), OCR finds insufficient evidence that the Division failed to implement the Student’s XXXX Section 504 Plan related to XXXX. Further, OCR finds insufficient evidence of Allegation 3(c), that the Division failed to provide accommodations for the XXXX tests.

persons should consider whether further evaluation or revisions to the student’s Section 504 Plan or placement are necessary.

In interpreting evaluation data and making placement decisions, the Section 504 regulation, at 34 C.F.R. § 104.35(c), requires that a school district draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; establish procedures to ensure that information obtained from all such sources is documented and carefully considered; 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; and ensure that each student with a disability is educated with peers without disabilities to the maximum extent appropriate to the needs of the student with a disability.

While the Section 504 regulation requires a school district to conduct an evaluation of any student believed to need special education or related services before taking action toward initial placement, the regulation does not impose a specific timeline for completion of the evaluation. Optimally, as little time as possible should pass between the time when the student’s possible eligibility is recognized and the district’s conducting the evaluation. An unreasonable delay results in discrimination against students with disabilities because it has the effect of denying them meaningful access to educational opportunities provided to students without disabilities. Timeframes imposed by the Individuals with Disabilities Education Act (IDEA) as well as state timelines for special education evaluations are helpful guidance in determining what is reasonable. The IDEA regulation, at 34 C.F.R. § 300.301(c)(1), requires that school districts complete evaluations within 60 days of receiving parental consent for the evaluation unless the state has established a different timeline, in which case evaluations must be completed within the timeline established by the state. Virginia state regulations generally require that all evaluations and decisions about eligibility be completed within 65 business days of the receipt of the referral by the special education administrator or designee (8VAC20-81-60(b)(1)(g)).

Analysis

Allegation 2

The Complainant alleged that the Division discriminated against the Student by failing to provide him a FAPE when the School conducted the Section 504 meeting on XXXX without a group of persons knowledgeable about the Student. The Division expressed willingness to enter into a resolution agreement concerning Allegation 2. Prior to that, OCR obtained and reviewed documents from the Division, and conducted interviews of five Division staff members XXXX.

OCR first reviewed email correspondence provided by the Division regarding the XXXX meeting. On XXXX, the Complainants emailed XXXX asking who would be invited to the Section 504 meeting. XXXX responded on XXXX, indicating that, in addition to herself, XXXX were invited. XXXX noted that a number of people who were invited were XXXX, and ultimately the Complainants emailed the Division on XXXX writing: XXXX 3 SENTENCES REDACTED XXXX. The Division convened the subsequent 504 meeting on XXXX.

OCR additionally reviewed the Division’s narrative response, which included a chart of the various individuals who attended the XXXX, 504 meeting, listing XXXX people the Division alleges were knowledgeable about the Student: XXXX. OCR interviewed XXXX and XXXX prior to the Division expressing a willingness to enter into an agreement.

XXXX⁷ told OCR that she has been the Student’s XXXX. She told OCR that during the XXXX school year, XXXX because he was XXXX time during the school year XXXX. She indicated that she emailed XXXX teachers to see how he was doing. XXXX told OCR that he attended the XXXX Section 504 meeting as the XXXX representative. When asked how he knows the Student, he told OCR that he worked XXXX with the Student XXXX.⁸ He told OCR that he XXXX with respect to modifying assignments or extending deadlines, and that XXXX. Finally, he told OCR that he could not recall whether he participated in the meeting other than telling the team XXXX. Finally, OCR reviewed an XXXX email from the XXXX in response to a request to attend the XXXX meeting, in which he wrote: XXXX SENTENCE REDACTED XXXX.

Based on the information received, OCR has identified possible compliance concerns, with respect to the composition of the participants at the XXXX Section 504 meeting. Specifically, OCR expressed concerns to the Division regarding whether the group of participants at the meeting included persons knowledgeable about the Student, the meaning of the evaluation data, and the placement options. As discussed above, OCR notes that a new Section 504 Plan was developed for the Student at this meeting, and the related aids and services provided to the Student were changed. In order to complete this investigation, OCR would need to interview all of the participants of that meeting and determine whether the Student was harmed or a denied a FAPE as a result of the meeting. As stated above, before OCR completed the investigation, the Division expressed willingness to resolve this allegation.

Allegation 3(a)

The Complainants alleged that the Division failed to evaluate the Student when she reported that he had problems utilizing his XXXX. She told OCR staff that she XXXX. The Complainants further reported that a XXXX. The Division denied that it failed to evaluate the Student. It stated that the Complainants told staff about a XXXX and Parent 2 informed XXXX on XXXX. The Division further stated that XXXX received a XXXX on XXXX. However, because XXXX and did not determine that there was a need to reconvene the Student’s Section 504 team.

The Division admitted that it did not convene the Student’s Section 504 team or initiate a special education evaluation when it was informed of the Student’s XXXX. The Division’s rationale was that XXXX. OCR obtained the letter submitted by the Complainants, and confirmed that XXXX. It was signed by a XXXX to the Student due to XXXX. In XXXX, dated XXXX stated that the Student has XXXX. She went on to describe the impact XXXX.

OCR also spoke to XXXX who stated that she spoke to the Complainants on or around XXXX, and the Complainants told her that she would be providing XXXX. XXXX said that, because

⁷ She told OCR that at typical Section 504 meetings, all of a student’s teachers participate.

⁸ He told OCR that the first time he met the Student was in the XXXX during special education and Section 504 meetings.

she never received XXXX, she took no further action on the Complainants' stated XXXX concern. However, she also told OCR XXXX. When OCR staff reviewed the XXXX, she stated, XXXX SENTENCE REDACTED XXXX. She continued, XXXX 2 SENTENCES REDACTED XXXX. XXXX also emailed other Division staff on XXXX stating the following:

XXXX PARAGRAPH REDACTED XXXX

She also acknowledged that she took no action after the XXXX conversation with the Complainants because she did not hear back from the Complainants about a XXXX and thought that "things are fine." She further confirmed that, only after the Student's parent requested an evaluation in XXXX, the Division did ultimately discuss their XXXX concerns and later provided XXXX accommodation. The Student's Section 504 Plan was modified to include XXXX. The Complainants did not allege that this accommodation was not provided after this date, and the Student's XXXX Section 504 Plan indicates that this was XXXX.

Based on the information received, OCR has identified a compliance concern. After the XXXX, the Division did not convene the Student's 504 team to discuss whether the Student required additional related aids and services in his Section 504 Plan as a result of the XXXX information. The Complainants provided XXXX, and the Division took no action regarding that information until XXXX. The evidence OCR received indicates that the Division required the Complainants to submit XXXX to verify his disability. Section 504 requires school districts to evaluate students who need or are believed to need special education or related services due to a disability. OCR received sufficient evidence that the Division was provided enough information to suspect that the Student had a disability and may have needed special education or related aids and services. When School staff received this information, including documentation of the Student's XXXX, the Division was then obligated to initiate an evaluation to determine whether the Student needed special education or related services. The Division's failure to do so violates Section 504. In order to address this violation, the Division agreed to the attached resolution agreement.

Allegation 3(b)

The Complainants alleged that the Division failed to provide extended time, modifications, and reduced assignments after XXXX. The Complainants told OCR staff that these accommodations were included in the Student's Section 504 plan on this date, but not before. The Complainants also told OCR staff that, with the exception of his XXXX, the Student's instructors failed to provide extended time, modifications and reduced assignments. The Division denied that the Student's teachers failed to provide extended time and modified/reduced assignments.

The Student's XXXX 504 Plan contains the following accommodations:

1. The Student to receive shorten[ed] or reduced assignment that reflect content mastery, as deemed necessary by the teacher;
2. Student to receive extended deadlines on classroom assignments and classroom testing; and

3. Student can request a classroom exam to be rescheduled to another date (if available) XXXX, still meeting final deadlines within FCPS county.

OCR spoke to the Student's XXXX teacher. He told OCR staff that that he allowed the Student XXXX. All of these were shortened, modified or reduced assignments. He also told OCR staff that he gave the Student as much time as he needed to complete XXXX. The Division also provided documentation of the provision of the Student's accommodations. These include XXXX emails to all of the Student's teachers with his new Section 504 Plan, and an email from the Student's XXXX teacher on XXXX stating that she "plans to modify the remaining XXXX assignments and exams as necessary." The XXXX teacher also submitted a report to the XXXX in XXXX in which he states that the Student's XXXX and that he often modified his lessons and gave his quizzes and examinations XXXX. As discussed below, the Student passed this course, which he took XXXX.

The Division also provided signed affidavits from the Student's XXXX teacher, XXXX teacher. The Student's XXXX teacher wrote, "During the year, I made significant modifications of the course expectations for [the Student], in keeping with his XXXX his 504 accommodations. For example, unlike his peers in the course, [the Student] was not required to XXXX, he did not need to take the XXXX. She also wrote that although XXXX, the Student is still being allowed to turn in work to complete her course. The XXXX teacher wrote that she provided extended deadline extensions for as long as the Student needed, that she significantly modified course content so that the Student was only responsible for mastery of core content, and that the Student was not required to complete minor projects. The XXXX teacher wrote that she allowed the Student extensions as long as necessary, even XXXX. She also wrote that she gave the Student options to complete the course while doing a much reduced amount of work. She further stated that she offered him the option of completing an XXXX final exam, but the Student declined. The Division also submitted emails from the XXXX teacher indicating that she "streamlined" a XXXX assignment on XXXX email that indicates that the Student was not required to complete all assignments to complete a semester of the course. The XXXX instructor stated that although the Student's disability would make him XXXX, she allowed extended time to learn material and take tests when he XXXX.

Although asked, the Complainants did not provide OCR with any specific instances of a failure to provide extended time, modifications, or reduced assignments or any other documentation or evidence in support of this allegation. In light of the documentation provided by the Division, OCR finds that there is insufficient evidence that the Division failed to provide extended time, modifications, or reduced assignments to the Student.

Allegation 3(c)

The Complainants also alleged that the Division failed to provide the Student's required accommodations for XXXX testing. When OCR clarified the allegation, the Complainants told OCR staff that the School did not accommodate the Student because the Division would not allow the Student XXXX Division staff. As a result, the Complainants alleged that the Student did not complete his XXXX testing, preventing him from XXXX.

The Division denied that it failed to provide required accommodations for the Student's XXXX testing. The Division stated that the Student, though in XXXX grade, still had outstanding XXXX. It further stated that successful completion of these tests is required XXXX. Ultimately, although many test opportunities were given to the Student throughout the year, the Division stated that he was often XXXX to complete the tests.

OCR examined the XXXX testing accommodations listed in the Student's Section 504 plans in place during the XXXX school year. Concerning testing, the Section 504 Plan dated XXXX only states that "If [the Student] is XXXX a test or assignment, he should be allowed to go XXXX."⁹ The Student's XXXX Section 504 Plan specifically addresses XXXX, but does not require or otherwise discuss XXXX. It states the following:

1. "In XXXX testing situations, student is to receive extended breaks for XXXX, if needed when requested."
2. "Extended time up to 50% on all XXXX testing."
3. "Student is allowed to write answers directly in test book for the XXXX."
4. "Student can request XXXX to be rescheduled due to XXXX prior to XXXX for XXXX, prior to XXXX for XXXX."

OCR also notes that the Complainants did not allege that they requested that the Student's Section 504 Plan include XXXX testing XXXX. OCR notes that the documents and the Complainants' supplemental meeting notes from the Student's XXXX meeting do not indicate a discussion of conducting XXXX testing XXXX. As noted above, there was no provision in the Student's Section 504 plan for the Division to provide XXXX testing as a Section 504 accommodation.

Based on the evidence OCR reviewed, there was insufficient evidence that the Division failed to provide the Student a FAPE, as alleged. The XXXX test that he did take in XXXX was provided according to the accommodations in his Section 504 plan and he did not take any others during the XXXX school year. The accommodation that the Complainants referenced XXXX is not listed in the Student's Section 504 plan as a necessary disability-related aid, service, or accommodation.¹⁰ Therefore, the Division was not obligated under Section 504 to implement it and OCR finds insufficient evidence of discrimination regarding this allegation.

Allegation 4

Legal Standard

⁹ As noted above, there was a Section 504 meeting in XXXX, but the Student's plan was not modified at that time.

¹⁰ OCR notes that the Student only took XXXX test, in XXXX, during the XXXX school year. According to emails submitted to OCR, the Student took this test XXXX. Prior to the provision of this test, the Complainants do not allege that they specifically requested XXXX and emails submitted by the Division do not indicate such a request. After the XXXX test, communications between the Complainant and the District and a statement from the XXXX indicate that the Division allowed XXXX and an alternative examination. Submitted email communications indicate that multiple opportunities for XXXX. However, the examinations were not ultimately scheduled because the Division and the Complainant did not agree on a time and date.

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 Division'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 Division treated the Student less favorably than similarly situated individuals without disabilities. If so, OCR then determines whether the Division had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the Division is a pretext, or excuse, for unlawful discrimination.

Analysis

Allegation 4

The Complainants alleged that in approximately XXXX, the Division discriminated against the Student based on disability by requiring him to XXXX school year. The Complainants alleged that the Student was discriminated against because he took his XXXX course through XXXX as a result of his disability and was required to retake the course during the next school year. The Complainants acknowledged to OCR staff that the Student XXXX school year. During the XXXX school year, the Complainants told OCR staff that he XXXX course. They further alleged that in XXXX, staff told him that he had to XXXX.

OCR initially analyzed whether the Student was required to retake the course, as alleged. The Division denied that it discriminated against the Student. Instead, the Division noted that the Student initially was told he was required to retake the XXXX course but, during his enrollment in the course, the Division determined that XXXX could be applied to the retaken course. OCR spoke to the XXXX. He told OCR staff that he was initially unaware that the Student had taken XXXX during the XXXX school year and did not allow the XXXX. However, sometime in the XXXX of the XXXX school year, he contacted School administration and requested that the Student be allowed to apply work from XXXX to the XXXX course. The teacher stated this was approved and noted that this helped the Student complete the requirements for the course by the end of the school year.

When OCR followed up with the Complainants after speaking with the XXXX teacher, the Complainants acknowledged that the Student did not ultimately have to XXXX his XXXX course but maintain that this only occurred because the Complainants advocated successfully against the Student having to retake the course.

The Complainants did not allege that the Division or its staff otherwise discriminated against the Student due to his disability concerning his XXXX class. For this reason and because the Student was not in fact required to retake XXXX as originally alleged, OCR finds that there is insufficient evidence to support the Complainants' claim of discrimination.

Conclusion

On December 5, 2016, the Division agreed to implement the enclosed Resolution Agreement (Agreement), which committed the Division to take specific steps to address the identified areas of noncompliance with regard to Allegation 3(a), under Section 303(b) of OCR's *Case Processing Manual*, as well as the possible compliance concerns identified with regard to Allegation 2 that the Division agreed to resolve under Section 302. The Agreement entered into by the Division is designed to resolve the issues of noncompliance and possible compliance concerns identified during the investigation. 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 additional 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 December 5, 2016, 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. 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 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, 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 Division's cooperation in the resolution of this complaint. If you have any questions, please contact Shana Heller or Timothy Riveria, the OCR attorneys assigned to this complaint. You can reach Shana Heller at 202-453-6599 or Shana.Heller@ed.gov, and Timothy Riveria at 202-453-6796 or Timothy.Riveria@ed.gov.

Sincerely,

/s/

Kristi R. Harris
Supervisory Attorney, Team IV
Office for Civil Rights
District of Columbia Office

Enclosure: Resolution Agreement