



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

March 2, 2017

Dr. Marcus J. Newsome  
Superintendent  
Petersburg City Public Schools  
255 South Boulevard East  
Petersburg, VA 23805

Re: OCR Complaint No. 11-16-1417  
Letter of Findings

Dear Dr. Newsome:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of the complaint we received on XXXX against Petersburg City Public Schools (the Division). The Complainant alleged that the Division discriminated against the Student on the basis of disability. Specifically, the complaint alleged:

1. The Division denied the Student a Free and Appropriate Education (FAPE) when it failed to implement provisions of the Student's Individualized Education Program (IEP) in the XXXX school year; and
2. The Division retaliated against the Complainant for her advocacy on behalf of the Student when the Student's XXXX did not allow the Student to participate 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. Because the Division receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

In reaching a determination, OCR reviewed documents provided by the Complainant and the Division, and interviewed the Complainant and Division faculty and staff.

After carefully considering all of the information obtained during the investigation, OCR identified a violation of Section 504 and Title II with regard to allegation 1. OCR found insufficient evidence to support allegation 2, but identified an additional violation of Section 504

and Title II in the course of investigating allegation 2<sup>1</sup>. The Division agreed to resolve the identified violations through the enclosed resolution agreement. OCR’s findings and conclusions are discussed below.

### **Background**

The Student was in the XXXX grade at XXXX (the School) during the XXXX school year. The Student began attending the School in XXXX. XXXX SENTENCE REDACTED XXXX. The Student attended school in another division during the XXXX school year. There, the Student was found eligible for special education services XXXX. The Student had an IEP in place dated XXXX. Since enrolling at the School in the Division, the Complainant had not signed to consent to a revised IEP, although the IEP team convened for that purpose.

### **Allegation 1**

The Complainant alleged the Division denied the Student a FAPE when it failed to implement the following provisions of the Student’s IEP in the XXXX school year:

XXXX PARAGRAPH REDACTED XXXX

### **Legal Standard**

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a 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. Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act 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.

### **Analysis**

#### *Applicable IEP*

As a threshold matter, the Division asserted a dispute about which IEP the Division was responsible for implementing. The Division asserted that after the Student transferred into the Division, the Division convened a meeting in XXXX to revise the Student’s IEP, including changes to the amount of special education services it was to provide the Student. The Division

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<sup>1</sup> On XXXX, the Complainant requested to withdraw this complaint and communicated her wish to withdraw any claim for an individual remedy or compensatory education services that might result from any potential findings. OCR’s Case Processing Manual Section 110 provides that OCR may close a complaint when a complainant withdraws the complaint after OCR has opened the complaint for investigation, but where OCR has already uncovered sufficient evidence of a violation with regard to any allegation, then OCR will not close the complaint. Since OCR had already uncovered sufficient evidence of violations prior to XXXX, OCR did not close the complaint.

stated the Complainant verbally agreed to the IEP dated XXXX at the meeting. The Division claimed the Complainant appeared to have signed on the wrong line, and that the Complainant clarified at a later IEP meeting that she did not consent to the IEP. The Complainant stated that she never agreed to the proposed IEP, that she is certain she did not sign on the wrong line, and never intended to sign to consent to it.

OCR examined the IEP documentation from the XXXX meeting. The IEP has a number of hand-written comments and notes on it, indicating it was not in final form. The box giving parental consent to implement the IEP is not checked and the line below it is not signed.

Since the Complainant did not sign to consent to the XXXX IEP, the Division should have been implementing the XXXX IEP. Therefore, OCR's analysis below refers to the XXXX IEP.

XXXX 3 PARAGRAPHS REDACTED XXXX

OCR finds sufficient evidence the Division failed to implement this provision of the Student's XXXX IEP.

XXXX 10 PARAGRAPHS REDACTED XXXX

Therefore, OCR finds sufficient evidence the Division denied the Student a FAPE when it failed to fully implement the Student's IEP.

## **Allegation 2**

The Complainant alleged the Division retaliated against the Complainant for her advocacy on behalf of the Student when the Student's XXXX.

## **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 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**

*Protected Activity*

An individual engages in a protected activity if she opposes an act or policy that she reasonably believes is discriminatory or unlawful under one of the laws that OCR enforces. The Complainant retained legal representation to help her advocate for the Student during IEP meetings in approximately XXXX. OCR finds the Complainant was engaged in protected activity.

*Adverse Action*

An adverse action is something that could deter a reasonable person from engaging in further protected activity. The Division did not allow the Student to participate XXXX. Since this could deter a reasonable person from engaging in further protected activity, OCR finds the Division took adverse action against the Complainant and Student.

*Nexus*

Next, OCR analyzed whether there was a causal connection between the protected activity and the materially adverse action. The Complainant retained legal counsel in approximately XXXX. The Complainant provided that the first IEP meeting her legal counsel attended was in XXXX, and their advocacy on behalf of the Student was ongoing thereafter. The XXXX teacher acknowledged she knew the Complainant had retained counsel in the later part of the school year. The classroom teacher stated she attended a meeting sometime XXXX with the Complainant's legal counsel present. The Principal stated that the decision about whether the Student could participate XXXX, and that she was not involved.

Since the teachers decided whether the Student could participate XXXX and they knew the Complainant and her legal counsel were actively engaging in advocacy on behalf of the Student at the time of the adverse action, OCR finds there is sufficient information to suggest a causal connection such that the adverse action was in retaliation for the protected activity.

*Legitimate, non-retaliatory reason*

OCR then determines whether the Division had a legitimate, non-retaliatory reason for its action. The Division asserted that all XXXX grade students received notice prior to the XXXX that “[s]tudents with behavior concerns will not be allowed to participate XXXX.” The Complainant denied ever having received any such notice. The Division stated that the Student was not permitted to participate XXXX because he did not “meet behavior expectations.” The Division provided:

XXXX PARAGRAPH REDACTED XXXX

The XXXX teacher stated that the XXXX was incentive-based. The classroom teacher stated it was meant to reward students who behaved well. The classroom teacher stated that there were requirements to participate in XXXX that students exhibited compliance with school-wide behavior and classroom rules. The classroom teacher

explained the decision of who could participate was made at the grade level between all the classroom teachers. The classroom teacher stated the Student was not allowed to participate for behaviors including XXXX.

The School provided the Student’s weekly “Daily Progress Reports” on which the Student’s classroom teacher reported the Student’s progress in the categories of “school work” and “behavior”. The report provides teacher feedback in the form of “satisfactory” or “unsatisfactory” in four sub-categories under the heading “behavior”:  
(1) Treats others with respect; (2) Follows both class and school rules; (3) Demonstrates good citizenship; (4) Behaves appropriately in special classes; and (5) Other.

The Student’s progress report for the week of XXXX, documented that XXXX. The report for XXXX, stated the Student refused to do his work and indicated unsatisfactory behavior for XXXX days of the week that the teacher filled out the report. The report for XXXX, indicated unsatisfactory behavior XXXX days the teacher reported, and stated the Student “XXXX”. The report for XXXX, stated XXXX.

The Student’s report for XXXX, stated the Student “[d]id very little work as he wanted to draw.” The report for XXXX, stated the Student was unsatisfactory in following class and school rules and demonstrating good citizenship on XXXX which the teacher reported. In the report for XXXX, the teacher indicated unsatisfactory in following class and school rules and demonstrating good citizenship for XXXX days she reported. In the report for XXXX, the teacher stated the Student XXXX. In the report for the week of XXXX, the teacher wrote on XXXX that the Student XXXX. XXXX 2 SENTENCES REDACTED XXXX.

In the report for XXXX, the teacher stated the Student XXXX.  
XXXX PARAGRAPH REDACTED

### *Pretext*

Lastly, OCR examines whether the Division’s reason for its action is a pretext, or excuse, for unlawful retaliation. The Principal provided that there were several other students in the Student’s grade who were not permitted to participate XXXX because of behavior. The Principal stated that none were students with IEPs or with parents who had legal representation to advocate on their behalf. OCR reviewed disciplinary records of other students who were not permitted to participate XXXX and interviewed the Principal about each student’s status. None were students with disabilities; none had IEPs or 504 plans, none had parents who engaged in advocacy on their behalf.

The Complainant stated the Division never provided her advance notice XXXX, and that she learned about it for the first time just the day before XXXX. The Division stated that it did send parents notice XXXX. OCR asked the Student’s classroom

teacher when and how the School notified parents XXXX. The classroom teacher responded that each classroom provided notice to their grade level. OCR asked the teacher when and how she provided notice to the parents of her students. She responded that she did not recall when or how. The Division provided OCR a copy of a notice of the XXXX; the notice does not have a date on it indicating when it was sent or how but includes information about a fundraiser that would begin on XXXX. The notice also stated that “[s]tudents with behavior concerns will not be allowed to participate in the trip.”

OCR asked the Complainant for supporting evidence or witnesses, but the Complainant was unable to provide further evidence. As such, OCR finds insufficient evidence that the Division’s legitimate non-retaliatory reason was pretext for retaliation. However, as discussed below, OCR found that the behavior for which the Division did not allow the Student to participate XXXX was likely a manifestation of his disability as it was contemplated in his IEP and that the Division violated Section 504 when it failed to reevaluate the Student to address XXXX.

#### *Failure to re-evaluate*

The Section 504 regulation, at 34 C.F.R. § 104.35(d), requires a school district to periodically reevaluate a student who has been provided special education or related services. Also, 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 persons should consider whether further evaluation or revisions to the student’s IEP, Behavioral Intervention Plan (BIP), or placement are necessary.

The Student’s XXXX IEPs state that the Student has behaviors that impede his learning. XXXX PARAGRAPH REDACTED XXXX.

The District convened the IEP team, including the Complainant, to conduct a Functional Behavioral Assessment on or about XXXX, and created a proposed plan on or about XXXX. There is no indication the plan was finalized, that the Complainant consented to the plan, or that it was implemented. Even if it was implemented, the Student’s progress reports discussed above show that the Student’s behavior continued to be a significant issue, indicating that to the extent behavioral interventions were implemented, they were not meeting the Student’s needs. The District provided OCR a notice for a meeting dated XXXX to discuss a BIP and review existing data XXXX, but it does not appear the meeting ever took place.

The Student’s progress reports indicate that the Division had notice of ongoing and escalating behavioral issues throughout the school year, beginning as early as XXXX. The Student’s IEP contemplated those same behaviors as manifestations of his disability. However, there is no evidence the Division re-evaluated the Student or implemented a BIP during the school year. Since the Division had information that the Student’s IEP was not meeting his individual needs due to his declining behavior, the Division should have re-convened his IEP team to consider whether changes to his IEP were necessary prior to XXXX. Since the Division failed to do so,

OCR finds sufficient evidence the Division violated Section 504 when it failed to reevaluate the Student in the XXXX school year.

### **Conclusion**

On February 23, 2017, the Division agreed to implement the enclosed Resolution Agreement (Agreement), which commits the Division to take specific steps to address the identified areas of noncompliance. The Agreement entered into by the Division is designed to resolve the issues of noncompliance. Under Section 303(b) of OCR's *Case Processing Manual*, a complaint will be considered resolved and the Division deemed compliant if the Division enters into an agreement that, fully performed, will remedy the identified areas of noncompliance (pursuant to Section 303(b)). OCR will monitor closely the Division's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct 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 February 23, 2017, if the Division fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings, including to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings, including to enforce the Agreement, OCR shall give the Division written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the Division's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. 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 regarding this letter, please contact Sheena Wadhawan, the OCR attorney assigned to this complaint, at 202-453-6664 or sheena.wadhawan@ed.gov.

Sincerely,

/s/

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

Enclosure

cc: Pakapon Phinyowattanachip  
*Via electronic mail to: PPakapon@reedsmith.com*