



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.

June 25, 2014

Dr. Eric J. Becoats
Superintendent
Durham Public Schools
511 Cleveland Street
P.O. Box 30002
Durham, NC 27702

Re: OCR Complaint No. 11-13-1153
Letter of Findings

Dear Dr. Becoats:

On March 18, 2013, the District of Columbia Office of the Office for Civil Rights (OCR), U.S. Department of Education, received a complaint of discrimination filed against Durham Public Schools (the District). The Complainant alleged that the District, in particular XXXX (the School), discriminated and retaliated against him and discriminated against students with disabilities in the School's COPE program (the Students).¹ Specifically, the Complainant alleged that the District:

- (1) Discriminated against the Students when it did not provide their teachers with computers and interactive whiteboards necessary for instruction, but provided these resources to teachers of general education students;
- (2) Did not provide the Students a free and appropriate public education (FAPE) when it:
 - (i) Inappropriately disciplined several students in Grades 3-5 and Grades K-2 by physically restraining their movement while they were seated in chairs, even though the students' BIPs and IEPs do not call for restraints and District policy prohibits the use of restraints except when a student poses a threat to self or to others.

¹ The Complainant also alleged that the District discriminated against him XXXX.

- (ii) Failed to provide instruction on a consistent basis to Students in the Grades 3–5 classroom when their regular classroom teacher was placed on administrative leave; and

(3) Retaliated against the Complainant XXXX

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, at 34 C.F.R. Part 104, 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), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public educational systems, regardless of whether they receive Federal financial assistance from the Department. These laws also prohibit retaliation against an individual because that person complained about discrimination or otherwise asserted rights under this law. As the District is a recipient of Federal financial assistance and a public entity, it is subject to the provisions of Section 504 and Title II.

In investigating the complaint, OCR reviewed documents submitted by the Complainant and the District. In addition, OCR interviewed the Complainant and staff in the COPE program, School, and District. OCR found insufficient evidence of discrimination with respect to Allegation 1, Allegation 2(ii), and Allegation 3. However, the District expressed a willingness to resolve the issues in Allegation 2(i) prior to the completion of OCR’s investigation and, pursuant to Section 302 of OCR’s *Case Processing Manual*, OCR discussed resolution options with the District. Below is a discussion of our determination with respect to each allegation.

Background

There are three COPE programs located in different schools within the District. Each of these therapeutic placement programs is designed to address the needs of students with chronic emotional and behavioral disabilities, many of whom engage in frequent outbursts of physical aggression. All of the students in the program are identified as students with disabilities and have Individualized Educational Programs (IEPs). Several students also have had Functional Behavior Assessments (FBAs) and Behavior Intervention Plans (BIPs). The program seeks to stabilize students, and their stay in the program may be on a short-term or long-term basis depending on their behavior needs.

The COPE program that is the subject of this complaint consists of two separate self-contained classrooms, one for Grades K-2 and another for Grades 3-5. It was temporarily—and with little advance notice—moved to the School at the beginning of the 2012-2013 school year because the school where it was originally located was undergoing renovations. It was subsequently returned to its original school for the 2013-2014 school year.

Allegation 1: Inaccessibility of Computers and Interactive Whiteboards

The Complainant alleged that, unlike staff in the regular education program at the School, the COPE teachers and other special education teachers did not have access to laptop computers and interactive whiteboards. He maintained that the absence of these resources adversely impacted the ability of COPE staff to perform important administrative tasks (e.g., complete functional behavioral assessment and behavior intervention plans) and provide instructional services (e.g., readily access certain curriculum online).

In response to this allegation, the District reported that a year earlier, during the 2011–2012 school year, the School had ordered new technology as part of an effort to introduce upgrades throughout the building. The COPE program was not included in the prior year's plan because the program was located in another school during the school-wide planning period. As a result, the technology that was available elsewhere in the building was different from that which was available in the two COPE classrooms.

When investigating an allegation of different treatment based on disability, OCR first determines whether there is sufficient evidence to show that students with disabilities were treated less favorably than their non-disabled peers. If so, an initial or *prima facie* case of different treatment has been established, and OCR must then determine whether the recipient had a legitimate, nondiscriminatory reason for the difference in treatment. Finally, we examine whether the reason given by the recipient is an excuse or pretext for unlawful discrimination.

Interactive whiteboards

School staff noted that evidence of the haste with which COPE transitioned from one school to the other is the fact that XXXX room was not a regular classroom. It was hastily converted from an office to a classroom just before the school year began and therefore the room was not among those slated to have an interactive whiteboard installed. On the other hand, the other COPE classroom, which served students in kindergarten through the second grade, did have an interactive whiteboard because it had housed fifth graders the previous year and an interactive whiteboard had been ordered for that room as part of the school-wide technology upgrade. In response to OCR's inquiry, the Principal confirmed that one non-COPE special education classroom in the School also had an interactive whiteboard and that, in addition to the XXXX, there were two regular education classrooms and one non-COPE special education classroom that did not have an interactive whiteboard at the beginning of the school year.² The Principal noted that teachers in these rooms were encouraged to use the Smartboard in the School's media center or the Smartboard in the School's Technology Center.

OCR finds that a *prima facie* case of different treatment exists as there were regular education classrooms that had interactive whiteboards while the XXXX did not. The District provided a legitimate, nondiscriminatory explanation for why the XXXX was not similarly equipped. Specifically, District staff explained that the XXXX was a former office, being used as a classroom on a temporary basis. Moreover, the COPE program had been temporarily and hastily

² The District reported that by March 2013, these remaining classrooms, including the special education classroom, all received Smartboards. The XXXX did not receive an interactive whiteboard because it was designated as an office and was only being used as a classroom on a temporary basis.

moved from another school in the 2013-2014 school year. Thus, the program had not been included in the School's planning for the technology upgrade. OCR then considered whether there is evidence that the District's explanation was an excuse or pretext for unlawful discrimination.

Testimony provided by the COPE teacher XXXX classroom and others indicates that one of the two COPE classrooms and one of the two non-COPE special education classrooms were equipped with an interactive whiteboard at the beginning of the year. In addition, two of the regular education classrooms were not equipped with an interactive whiteboard at the outset of the year. The fact that the other COPE classroom and another special education classroom had the technology all year while some regular education classrooms did not suggests a lack of intent to discriminate against students with disabilities and against students in the COPE program particularly.

OCR also notes that, XXXX students could have accessed this technology in the School's media center when needed. In addition, for much of the school year students in several regular education classrooms—which also did not have interactive whiteboards installed at the beginning of the school year—were similarly required to go to the media center to gain access to the equipment when needed. In short, while there is evidence of some difference in access to whiteboards, the District provided a legitimate, nondiscriminatory explanation for that difference, the evidence does not suggest that the explanation is a pretext for discrimination, and the record shows that the XXXX was not significantly adversely impacted as it did have access to that technology when needed.

Computers

The District confirmed that XXXX was not issued a laptop and teachers of regular education classes were. This establishes a prima facie case of different treatment. Therefore, OCR inquired as to the District's reason for the difference.

The District explained that COPE staff members were not included when orders were taken for laptop computers during the prior school year (again, because at that time the program was located at a different school) so laptops were not purchased for them. The District further explained that desktop computers were installed in both COPE classrooms and that these computers were connected to the internet and to the School's network. The XXXX and other COPE staff also confirmed that both COPE classrooms were equipped with desktop computers. The District explained that, because the COPE classrooms were self-contained and students did not move from room to room during the day, desktop computers were appropriate.

OCR considered whether there is evidence that the District's explanation is a pretext for discrimination. OCR noted that the special education teachers who were not a part of the COPE program were provided laptop computers during the 2012-2013 school year. Those other special education teachers moved around the building during the day in order to provide services to individual students. The fact that other special education teachers received laptops suggests that the School did not intend to discriminate against students with disabilities through the distribution of laptops to teachers.

OCR notes that the Complainant did not articulate, and the evidence did not indicate, that the COPE students were adversely impacted by the fact that XXXX had not been issued a laptop computer. All of the staff interviewed by OCR reported that they had never heard XXXX express concerns or dissatisfaction with either the amount or type of technology in his classroom during the school year. On the contrary, a desktop computer was in the XXXX and program staff reported that computer time was often assigned to COPE students as a reward to motivate desired behavior and for regular instructional purposes during the school day.

Program staff also reported that computers (including a laptop that was located in the special education office and laptops available for loan from the media or technology coordinator) were available to XXXX and other COPE staff for the completion of administrative tasks if needed. XXXX, the Principal noted that XXXX apparently did not understand the limitations of the technology. XXXX She noted that those teachers who worked on BIPs and FBAs at home did so because they had downloaded the forms from the intranet to USB flash drives while at work, and subsequently accessed the documents they had downloaded at home. She pointed out that XXXX could have done the same XXXX. In addition, networked computers were available in the School's computer lab and available to everyone.

For these reasons, OCR finds that there is insufficient evidence to establish that the District discriminated against the Students in the manner alleged.

Allegation 2(i): Failure to Provide FAPE-Inappropriate Discipline

The Complainant alleged that several students in the program were subjected to inappropriate physical restraints and that this was due, at least in part, to inadequate staff training. In response to this allegation, OCR requested and reviewed the students' IEPs and Behavior Intervention Plans; District policies on restraint and seclusion; and records documenting physical restraints that occurred in the program during the school year. OCR also interviewed relevant District staff, COPE staff, and the Principal.

The District expressed a willingness to resolve the issues in the complaint prior to the completion of OCR's investigation and, pursuant to Section 302 of OCR's *Case Processing Manual*, OCR discussed resolution options with the District. On May 16, 2014, the District signed a voluntary resolution agreement (copy enclosed), which, when fully implemented, will resolve the complaint. OCR will monitor implementation of this agreement, which includes provisions that are consistent with the applicable regulations, and are aligned with the allegation raised in the complaint and information obtained during the course of OCR's investigation.

Allegation 2(ii): Failure to Provide FAPE-Inconsistent Classroom Instruction

The Complainant expressed concern that XXXX for just over four weeks in February and March 2013,³ XXXX students did not receive instruction from a certified teacher. The Complainant expressed a general concern to OCR pertaining to the credentials or licensure status of staff assigned to XXXX classroom XXXX and questioned whether a non-licensed teacher could

³ XXXX

appropriately meet the educational needs of the Students. Though asked by OCR, he did not provide any additional details regarding this concern nor did he identify any particular educational services that the Students failed to receive during that period. The laws enforced by OCR do not require any particular certification or licensure for substitute teachers.

In response to this allegation, the Principal reported that, XXXX, substitute teachers were assigned to his classroom or, on occasions when none were available, the teaching assistant assigned to the room would be assisted by another teaching assistant and together they continued to provide instruction XXXX. The teaching assistant who was assigned to the room had XXXX years of experience. While the Principal acknowledged that it was very difficult to recruit teachers with the requisite skills and credentials to work in a challenging COPE classroom, she said that she relied on other COPE staff (i.e., the case manager and behavior specialist) to be her “eyes and ears” and she reiterated that no one reported any problems related to instruction in that classroom XXXX.

In an interview with OCR, the teaching assistant assigned to the XXXX confirmed that “there were assignments for each student every day.” The substitute teachers or teaching assistants provided instruction based on lesson plans that were developed XXXX, and the teaching assistants continued to prepare and submit the required forms that indicated that Students were completing their work.

Based on the information provided, OCR finds that the evidence does not establish that the Students in XXXX were denied FAPE due to the credentials of the teachers who provided instruction during XXXX.

Allegation 3: Retaliation

Section 504 prohibits retaliation against an individual because that person complained about discrimination or otherwise asserted rights under the statute. When analyzing a claim of retaliation, OCR will look at the following three elements to determine if the Complainant has stated an initial case: (1) whether the Complainant engaged in a protected activity (e.g., filed a complaint or asserted a right under a law enforced by OCR); (2) whether the District took a materially adverse action against the Complainant; and (3) whether there is some evidence that the District took the adverse action as a result of the Complainant’s protected activity.⁴ If all of these elements are established, an initial, or *prima facie*, case of retaliation exists. OCR then determines whether the District has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the District’s reason for its action is a pretext or excuse for unlawful retaliation. In its analysis, OCR may, for example, consider whether a recipient treated the Complainant in a manner that was consistent with its established policies and procedures.

<XXXX PARAGRAPHS DELETED XXXX>

Conclusion

⁴ XXXX

As noted previously, with regard to the issues raised in Allegation 2(i), the District voluntarily entered into the enclosed Resolution Agreement (the Agreement), which will bring the District into compliance with Section 504 and Title II. OCR will monitor the District's implementation of the Agreement, full implementation of which will resolve OCR's concerns. With regard to Allegation 1, Allegation 2(ii), and Allegation 3, OCR concluded that the evidence did not support compliance concerns.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the College'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.

We have advised the Complainant that the District may not harass, coerce, intimidate, or discriminate against an individual because he or she filed a complaint or participated in the complaint resolution process. If this happens, that individual may file another complaint alleging such treatment. 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, to the extent provided by law, personal information that, if released, could constitute an unwarranted invasion of privacy.

OCR appreciates the cooperation of the District in the resolution of this complaint, and in particular, the District's attorney, Ms. Eva DuBuisson. If you have any questions or concerns regarding this letter, please contact the OCR staff assigned to investigate this complaint, Duane Scott, at (202) 453-6596 or duane.scott@ed.gov, or Karen WalkingEagle, at (202) 453-6614 or karen.walkingeagle@ed.gov.

Sincerely,

Alessandro Terenzoni
Team Leader, Team II
District of Columbia Office
Office for Civil Rights

Enclosure
cc: Eva DuBuisson