



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

August 26, 2016

Dr. Darryl Owings
Superintendent
Spartanburg County School District 6
1390 Cavalier Way
Roebuck, South Carolina 29376

Re: OCR Complaint No. 11-15-1209
Letter of Findings

Dear Dr. Owings:

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 April 17, 2015, against the Spartanburg County School District 6 (the District), in particular XXXX (the School). The Complainant filed the complaint on behalf of his son (the Student) and alleged discrimination based on disability (learning disability). Specifically, the complaint alleged that:

- 1) The District retaliated against the Student when one of his special education teachers ("Teacher A") gave him negative behavior points during the 2014-2015 school year; and
- 2) The District failed to implement the Student's Individualized Education Program (IEP) by failing to provide, during the 2014-2015 school year:
 - a. the required number of hours of Occupational Therapy (OT) services;
 - b. the required number of hours of counseling;
 - c. the required number of hours of behavioral modification services;
 - d. adaptive software; and
 - e. grade-level writing, comprehension, and mathematics instruction.

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 District

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

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 District and interviewed the Complainant and District faculty/staff.

After carefully considering all of the information obtained during the investigation, OCR identified a compliance concern regarding allegation # 2a. The District agreed to resolve the concerns through the enclosed resolution agreement. However, OCR found insufficient evidence to support the remaining allegations.

OCR's findings and conclusions are discussed below.

Background

The Student was in the sixth grade at the School during the 2014-2015 school year. He was in a self-contained Special Education classroom for English Language Arts (ELA) and Math. The Student had an IEP that went into effect on October 23, 2014 (the October IEP), and a revised IEP that went into effect on March 19, 2015 (the March IEP).

Legal Standards and Analysis

Allegation 1: The District retaliated against the Student when one of his special education teachers ("Teacher A") gave him negative behavior points during the 2014-2015 school year.

When analyzing a claim of retaliation, OCR will look at: 1) whether the individual engaged in 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 individual; and 3) whether there is some evidence that the District took the adverse action as a result of the protected activity. If all these elements are present, this establishes an initial, or prima facie, case of retaliation. 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.

According to both the Complainant and Recipient, on September 26, 2014, the Complainant advocated that the District fire a school employee after this employee allegedly made gestures insinuating that the Student was "crazy" and had mental health disabilities. The Student's teachers informed OCR that they were aware that the Complainant had advocated that the teacher be removed. Accordingly, OCR determined that District staff was aware of this advocacy, and that the Complainant engaged in a protected activity.

According to the Complainant, Teacher A removed behavior points from the Student on two occasions in retaliation for the aforementioned protected activity: February 6, 2015 and May 15, 2015. OCR further determined that the Student did, in fact, lose three behavior points on February 6, 2015 and four behavior points on May 15, 2015 pursuant to the class's "behavior reinforcement system." The District provided OCR with classroom documents entitled "Rules,"

“Consequences” and “How to Lose Points” that outline how this system. Students receive ten points every Monday. If a student does not follow a rule, the student loses a point. Specifically, students lose points for: 1) talking without permission; 2) getting out of their seat without permission; 3) not keeping hands, feet, or objects to themselves; 4) not putting their name on their work; 5) disrespecting others; 6) not having their pencils, planner, or books; 7) using up all of their bathroom passes¹; 8) not following directions; 9) being off task; or 10) going to their locker during class.” Severe behaviors, designated as “Automatic Sent Out,” are reserved for “fighting, stealing, cussing, and bullying.” Students do not lose points for “Automatic Sent Out” actions, but are removed from the classroom. According to Teacher A and the written document, students typically lose one point per incident. One or two points lost triggers a “warning;” three points results in a note sent to parents; four points results in a silent lunch, which means that the student sits at a separate table; five points leads to a working lunch, which means that the student sits at a separate table and has to complete an assignment; six points results in parent contact by phone; and seven to ten points lost triggers an “office referral.”

The Student’s discipline log indicates, and Teacher A confirmed, that the Student lost points for the following: on February 15, 2015, he lost three behavior points for: “1. Not following directions when told to put something up; 2. Not lining up with class at lunch; 3. Saying inappropriate things in the bathroom.” Teacher A stated that the Student received a note home for these incidents. Additionally the Student’s discipline log indicates, and Teacher A confirmed, that the Student lost four points on May 15, 2015 for: “Not returning to class for self-advocacy lesson after being reminded;” “Not following directions - Not completing work;” “Rolling eyes at teacher;” and “Disrespect toward the teacher.” Teacher A stated that the Student received a “silent lunch” for these incidents.

OCR determined that the docking of behavior points constitutes a materially adverse action since the Student experienced a consequence – namely, a phone call home and a “silent lunch” for losing points on these occasions. Lastly, there is some evidence to indicate that the adverse action may have resulted from the protected activity, because one set of behavior points was removed in February 2015, approximately four months after the Complainant advocated that the teacher be fired, and the other set of behavior points was removed in May 2015, approximately seven months after the Complainant advocated that the teacher be fired. OCR therefore finds that the Complainant has stated an initial, or prima facie case of retaliation.

OCR next examines whether the District provided a legitimate, non-retaliatory reason for removing the Student’s behavior points. The February 15, 2015 discipline log indicates that the Student lost points for: “Not following directions when told to put something up; Not lining up with class at lunch; and Saying inappropriate things in the bathroom.” All of these incidents are bases for removing points under the behavior system described above – namely not following directions, being off task, and disrespecting others. Additionally, the May 15, 2015 discipline log indicates that the Student lost behavior points for “Not returning to class for self-advocacy lesson after being reminded;” “Not following directions - Not completing work;” “Rolling eyes at teacher;” and “Disrespect toward the teacher.” As with the February 15, 2015 discipline log,

¹ One of the Student’s teachers explained that students receive twelve bathroom passes every nine weeks. The students may use these passes to leave the room for any reason, but if they use up all these passes and leave the room again, they lose a behavior point.

the incidents described in the May 15, 2015 discipline log are bases for removing points under the behavior system described above – namely, not following directions, being off task, and disrespecting others. Teacher A informed OCR that she remembers removing behavior points from the Student on these occasions because he did, indeed, engage in these activities.² Based on the aforementioned, OCR finds that the District has offered a legitimate, non-retaliatory reason for removing the Student’s behavior points on those occasions. Accordingly, OCR must examine whether the District’s reasoning was pretext for retaliation.

Teacher A informed OCR that there have been no occasions in which students engaged in similar off-task behavior to the Student and for whom she did not remove behavior points. OCR determined that similarly-situated students also lost points for similar behavior, and that all students in the class lost points at least once during the 2014-2015 school year.³ This includes students/parents of students who had not engaged in prior protected activities. Additionally, OCR determined that the reasons for docking behavior points outlined in the incident report are consistent with the class’s written practice. Therefore, OCR determined that there is insufficient evidence to conclude that the District’s rationale for docking the Student’s behavior points on May 15, 2015 and February 6, 2015 constituted pretext for retaliation. Accordingly, OCR has insufficient evidence to conclude that Teacher A retaliated against the Student, and it will take no further action with respect to Allegation 1.

Allegation 2: The District failed to implement the Student’s Individualized Education Program (IEP) by failing to provide, during the 2014-2015 school year:

- a. the required number of hours of Occupational Therapy (OT) services;*
- b. the required number of hours of counseling;*
- c. the required number of hours of behavioral modification services;*
- d. adaptive software; and*
- e. grade-level writing, comprehension, and mathematics instruction.*

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. Implementation of an Individualized Education Program (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 FAPE to the same extent required under the Section 504 regulation.

a. Occupational Therapy

² The Complainant informed OCR that he believes some of these incidents were the result of a misunderstanding by Teacher A. However, the Complainant did not provide, nor could OCR find, anything to indicate that Teacher A’s actions were motivated by the Complainant’s prior protected activity.

³ For example, Teacher A removed behavior points from a student on February 25, 2015 for “refusal to do work” and another on March 10, 2015 for “not following directions, sleeping, refusal to do work.”

OCR determined that the Student's October IEP requires 30 minutes per week of OT services, beginning on October 24, 2014 and concluding on May 29, 2015. The Prior Written Notice, dated October 23, 2014, clarifies that "due to [the Student's] fine motor difficulties, [the Complainant] feels that OT services would benefit [the Student] at this time." The meeting minutes indicate that members of the IEP team disagreed with the Complainant over the necessity of OT services. Nonetheless, the minutes make clear that the IEP ultimately "agreed to OT for handwriting," and that the services would take place "once a week." The minutes add that "the team will reconvene by December and decide if once weekly is still the best plan for [the Student] or if changes should be made."

OCR determined that the IEP team did reconvene on March 19, 2015. OCR found that at this time, the IEP team changed the Student's IEP so that it only required Indirect OT services between March 19, 2015 and October 22, 2015. These services would take place for "0 minutes weekly." OCR further noted that the Prior Written Notice, dated March 19, 2015, states that "OT services will now be indirect services." It adds that the Student "has made progress in OT and does not need direct services for OT at school at this time." Lastly, in the meeting minutes, it states that "[OT provider] will continue OT services but will serve him indirectly. She will write some plans for him to work on with [the PE Instructor] in PE."⁴

Based on the aforementioned, OCR determined that the Student was entitled to 9.5 hours of OT services between October 24, 2014 and March 19, 2015.⁵ Between March 19 and the end of the 2014-2015 school year, OCR found that there was a disagreement between the Complainant and the District over how to interpret the provision of "Indirect" OT services. The Complainant initially informed OCR that this provision was a "gray area," but then clarified that he interpreted this portion of the IEP to require that the OT provider consult with the physical education (PE) teacher on designing OT exercises for the Student to perform in class, with the assistance of the PE shadow. The Student was to perform these exercises with the assistance of the shadow each time he attended PE class. In support of this interpretation, the Complainant notes that the Student had a broken arm in the late summer of 2014 and therefore could not participate in any of the regularly-assigned PE activities. He therefore required a modified set of activities to improve his motor skills each time he attended PE. In contrast, according to the PE teacher and the Director of Special Services, both of whom attended the March 2015 IEP meeting, this provision did not require that the Student receive OT services each time the Student attended PE. Rather, according to them, it required that the Student only receive OT services if he was not able to participate in the regularly-assigned activities; if the Student was able to participate in the regularly-assigned activities, the IEP did not require the Student to receive OT services.

⁴ OCR found that the March IEP still contains some language indicating that the Student was entitled to direct OT services. Specifically, on page 3 of the IEP, it states that "[d]ue to team discussion and decision student will receive direct OT services for the 2014-2015 school year." Additionally, on page 8 of the IEP, under a section entitled "Specific directions, considerations, or delivery methods for special education, other related services, and supplementary aids and services," it states that the Student will receive "30 minutes of occupational therapy weekly." The District informed OCR that the provisions remained in the IEP in error. OCR finds this credible given the aforementioned language referenced in the IEP, Prior Written Notice, and Meeting Minutes clearly indicating that the IEP now intended for the Student to receive only indirect services.

⁵ OCR reviewed an academic calendar for the 2014-2015 school year, and determined that there were 19 academic weeks between the dates in question. Accordingly, since the Student was entitled to 30 minutes per week, OCR determined that he was entitled to a total of 9.5 hours of OT services during this period.

Based on a plain reading of the March IEP, Prior Written Notice, and meeting minutes, OCR has determined that the IEP does not appear to require a specific number of minutes of direct OT services after March 19, 2015. Rather, it only requires “Indirect” services, including writing plans to potentially incorporate in the Student’s general PE class. This language indicates that the IEP team’s goal was not to require OT services in PE, as the Complainant asserts. Rather, a preponderance of the evidence indicates that the IEP only intended to use this plan on an as-needed basis, as the District contends. This interpretation is bolstered by the fact that the IEP itself requires these Indirect services for “0 minutes weekly.” The PE Instructor informed OCR that during this time period, [OT provider] provided him with a plan, including the use of a one-on-one shadow if necessary. However, he stated that the Student was always able to perform in a manner similar to other students. Accordingly, there was never a need to implement the plan.⁶ Based on the aforementioned, OCR determined that the District implemented the Student’s March IEP by providing for a plan and strategies for the Student in his PE class. Therefore, OCR will limit its remaining review to whether the Student received direct OT services between October 24, 2014 and March 19, 2015.

With regard to the “direct OT” stated in the October IEP, as previously discussed, OCR determined that the Student was entitled to a total of 9.5 hours of direct OT services between October 24, 2014 and March 19, 2015. OCR reviewed the Student’s OT service logs, and determined that during this period, the Student received a total of 12 sessions of OT services, totaling 6 hours.⁷ OCR did not find, nor could the District provide, any evidence to indicate that it attempted to make up the remaining 3.5 hours of services.

Based on the aforementioned, OCR determined that a preponderance of the evidence indicates that the District failed to provide the Student with 3.5 hours of direct OT services between October 24, 2014 and March 19, 2015, as required by his IEP. Accordingly, OCR has found sufficient evidence of a violation, and it will attempt to enter into a resolution agreement to resolve this portion of Allegation 2.

b. Counseling

With regard to counseling, OCR determined that there is no provision in either IEP requiring that the Student receive counseling services. According to the Complainant, although it was not necessarily written into the IEP, the meeting minutes dated October 23, 2014 demonstrate the fact that a group of knowledgeable persons orally agreed that counseling was part of the IEP. According to District personnel, however, the IEP team, including the Complainant, met on October 23 and agreed that counseling would not be part of the IEP. OCR reviewed the meeting minutes from October 23, 2014, and determined that they state that “[counseling] will not be included in the IEP and [Complainant] said he was in agreement.” Accordingly, OCR finds

⁶ According to this plan, the Student, when necessary, would engage in strength exercises, including shoulder exercises; wand exercises; eye hand coordination; and ball skills.

⁷ The log further indicates that on five occasions, the service provider did not provide OT services because either the therapist was not available or because of inclement weather. OCR determined that the IEP only requires that the Student receive these services weekly – it does not specify a particular day of the week. Accordingly, OCR finds that if the service provider was unavailable or there was inclement weather, this individual still had an obligation to make up each of these dates on another day of the week.

insufficient evidence that the District denied the Student a FAPE by failing to provide counseling services.

c. Behavioral Modification Services

The Complainant clarified that “behavioral modification services” referred to “counseling.” As discussed above, OCR found insufficient evidence that the District denied the Student a FAPE by failing to provide counseling services, so it will take no further action with regard to this allegation.

d. Adaptive Software

The Complainant clarified that by “adaptive software” he was referring to the use of Dragon Naturally, a voice to text technology. Under the “Accommodations and Modifications” sections of both the October and March IEPs, “written assignments can be typed on the computer or using Dragon Naturally.” There is no discussion of this further in the meeting minutes of the March 2015 IEP. In the October 2014 meeting minutes, it states that: “[IEP team member] stated a line of communication was key...Dragon Speak Naturally or keyboarding.” Thus, from the plain words of the IEP and from the meeting minutes from October 2014, OCR interprets this provision of the IEP to require that the School make available for the Student either Dragon Naturally or the use of computer. However, it is not required to provide him with both.

The Student’s ELA teacher stated that there were seven computers available for the Student’s use in her classroom, and if the Student asked to use a computer for a writing assignment, she allowed him to do so. The teacher stated that she recalled several occasions in which the Student used the computer to complete writing assignments. This included use for completion of vocabulary sheets, a self-advocacy power point, the completion of activities located on a website, an assignment entitled “Paws in Jobland,” the “ItsLearning” website, an animal research project, programs called VMath, TransMath, Weather Webquest, and various other work assignments. The Student also acknowledged that he used the computer to complete some writing assignments. The Student stated, however, that there were two or three occasions in which he asked to use the computer but the teacher refused permission. The teacher disputes this and states that she never denied him the ability to use the computer when he asked. Because both the teacher and the Student acknowledge that the Student used a computer for at least most writing assignments, OCR finds that the Student was aware of his right to use the computer. Because OCR could not find, nor could the Complainant or Student provide, any evidence to substantiate the Student’s assertion that the teacher refused him permission to use a computer on any occasion, OCR finds insufficient evidence to conclude that the District failed to implement this portion of the Student’s IEP, as alleged.

e. Grade-level writing, comprehension, and mathematics instruction

According to the Complainant, the IEPs require that the Student receive instruction on a sixth grade level in writing, comprehension, and math. However, both the October and March IEPs state, under “Accommodations and Modifications,” that the Student is to receive “off grade level instruction in math.” Moreover, neither the IEPs nor the meeting minutes state that the Student

is required to receive on-grade level instruction in any subject. Accordingly, OCR finds insufficient evidence to conclude that the District was required to provide the Student with grade-level writing, comprehension, and mathematics instruction, as alleged.

Conclusion

On August 26, 2016, the District agreed to implement the enclosed Resolution Agreement (Agreement), which commits the District to take specific steps to address the identified areas of noncompliance. The Agreement entered into by the District 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 District deemed compliant if the District enters into an agreement that, fully performed, will remedy the identified areas of noncompliance (pursuant to Section 303(b)). OCR will monitor closely the District'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 District 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 District on August 26, 2016, if the District 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 District 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 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 District's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact Todd Rubin at 202-453-5923 or todd.rubin@ed.gov or Tracey Solomon at 202-453-5930 or tracey.solomon@ed.gov.

Sincerely,

/S/

David Hensel
Supervisory Attorney, Team III
Office for Civil Rights
District of Columbia Office

Enclosure