



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

May 4, 2016

Dr. Deran R. Whitney
Superintendent
Suffolk Public Schools
100 North Main Street
Suffolk, Virginia 23434

Re: OCR Complaint No. 11-16-1055
Letter of Findings

Dear Dr. Whitney:

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 November 9, 2015 against Suffolk Public Schools (the Division). The Complainant alleges that the Division discriminated against the Student on the basis of disability. Specifically, the complaint alleges that:

1. The Division treated the Student differently because of a perceived disability when it required that the Student work from home between <XXXX>
2. The Division treated the Student differently because of a perceived disability when it required him to work in a room separated from other students on <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.

Before OCR completed its investigation, the Division expressed a willingness to resolve Allegation 1 by taking the steps set out in the enclosed Resolution Agreement. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Resolution Agreement.

Additionally, OCR conducted a full investigation of Allegation 2, and did not find sufficient evidence to support it. OCR's findings and conclusions for this allegation are discussed below.

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

Allegation 1: The Division treated the Student differently because of a perceived disability when it required that the Student work from home <XXXX>

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 disability¹ 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 or perceived 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.

The Student was in the first grade at <XXXX> (the School) during the 2015-2016 school year. OCR determined that the Student was absent on multiple occasions between <XXXX>, the start of the school year, and <XXXX>, the Division held an evaluation eligibility meeting with the Complainant and determined that he should be evaluated for an Individualized Education Program (IEP). According to the Complainant, immediately after this meeting concluded, the <XXXX> held another meeting to plan how to bring the Student to school safely, given that he was exhibiting some behavioral issues.

The Complainant informed OCR that at the meeting on school safety, School staff told her not to bring the Student to school until the Division completed the IEP evaluation. Moreover, she stated that the Counselor asked the <XXXX> to send the Student’s homework home with the <XXXX> during this period. Based on the discussions at this meeting, the Complainant asserted that she kept the Student home from school until <XXXX>.²

Given this assertion, OCR must determine whether the Division treated the Student differently by actively prohibiting the Complainant from sending the Student to School as a result of a perceived disability. As an initial matter, OCR finds sufficient evidence to conclude that the

¹ The definition of a person with a disability, as defined in the regulation implementing Section 504, at 34 C.F.R. § 104.3(j), encompasses an individual who is regarded as having a physical or mental impairment that substantially limits a major life activity. The regulation further states, at 34 C.F.R. § 104.3(j)(2)(iv), that “regarded as having an impairment means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.”

² OCR determined that the soon after the Student returned to school, on October 30, 2015, the Complainant went to the Division’s central office and met with a Special Education Supervisor (Supervisor). After this meeting, the Student was placed on homebound instruction until his IEP evaluation was complete. Homebound services started on Monday, November 2, 2015. The Student was found eligible for an Individualized Education Program on November 25, 2015, and after several weeks, the Student was successfully transitioned back to school.

Division regarded the Student as having a disability, since they had a meeting on <XXXX> that resulted in an evaluation for special education services.

OCR must next examine whether the Division in fact told the Complainant not to bring the Student to school until it completed the IEP evaluation. OCR spoke to the participants at the September 24th meeting, and each one independently denied telling the Complainant not to bring the Student to school. According to the Principal, she told the Complainant that she in fact should be bringing the Student to school, and added that they would make sure that the Student remained safe. Additionally, according to a written statement by the Counselor, the group agreed to send assignments home to the Student only because he had already missed so much time due to prior absences. OCR could not find, nor could the parties provide, any notes or other documentation of what occurred at this meeting.³

Given this discrepancy, OCR must next review any relevant circumstantial evidence. OCR determined that between <XXXX>, the Student did not come to school. During this time, OCR finds that the Division made limited efforts to address the Student's absences; however, despite multiple absences, the Division did not fully implement its truancy procedures.

According to the Division's Student Handbook, if a student is absent for any reason, the Division will send automated calls to a parent or guardian. If a student has three or more unexcused absences, the Division will send a letter to a parent or guardian notifying him/her of the absence and its seriousness. If there are five or more unexcused absences, the parent/guardian and student must attend an in-person conference with School staff, generally including a teacher, assistant principal, social worker, and school resource officer. If a student has seven or more unexcused absences, he/she may be referred to a Truancy Review Team and/or the Division will file legal proceedings.

OCR reviewed the Student's attendance record, and determined that during the period in question, he received 12 consecutive absences. OCR found that the Division followed some of the aforementioned policy. Specifically, OCR determined that the Complainant received automated calls about the Student's lack of attendance on <XXXX SENTENCE REDACTED XXXX>. Additionally, an email by the Principal, dated January 6, 2016, indicates that the Student was dropped from enrollment for not attending classes for <XXXX>⁴

However, OCR could not find, nor could the Division provide, any evidence to indicate that the School notified the Complainant by letter of the Student's unexcused absences, scheduled an in-person meeting, referred the Student to a Truancy Review Team, or filed legal proceedings. Moreover, with respect to the automated calls, the Complainant stated that sometime in October, she called the School's office and spoke to an <XXXX> about the automatic calls she was getting. She stated that the <XXXX> told her to "avoid" the calls. She added that it was not until <XXXX> that she received a call from an <XXXX> at the "Board of Education" who had just received a referral from the Student's doctor. She stated that this investigator told her that the Student needed to be in school, or that the Complainant would be charged with truancy.

³ OCR also determined that IEP evaluation meeting notes are silent on this issue.

⁴ This includes absences prior to September 24, 2015.

According to the Complainant, the investigator had just received the report from the Student's doctor that day. As result of this call, the Complainant sent the Student back to School.

The Division could not provide, nor could OCR find, any other documentary evidence of communications between the Complainant and the Division regarding the Student's attendance during this time period. However, the Counselor told OCR that about a week before the Student came back to school, a <XXXX> called her asking why the Student was not in school. The Counselor reported to OCR that after receiving this call, she called the Complainant and asked her to bring the Student to school. The Complainant, however, denied that this call took place.

The Division acknowledged to OCR that it did not follow its truancy policy. However, it noted that this occurred because the School staff member typically responsible for following-up on truancy issues was on medical leave during this period; therefore, the Division erroneously failed to contact or otherwise communicate with the Complainant. Therefore, they argue that the Division's failure to follow-through, while an oversight, does not support the Complainant's position that School staff informed her at the meeting that the Student may not come to School during the evaluation process.

Lastly, OCR will note that during the course of the investigation, the Division provided OCR with a copy of a "Formal Complaint" submitted to the Division on <XXXX> by the Complainant. This complaint raised a discrimination allegation similar to this allegation; however, the Division acknowledged that the person responsible for investigating and resolving internal Section 504 complaints left the Division suddenly in the <XXXX>. They added that in the transition, the Complainant's formal Section 504 complaint was overlooked, and the Division never responded to it.

Pursuant to Section 302 of OCR's *Case Processing Manual*, the Division signed the enclosed Resolution Agreement on May 3, 2016, which, when fully implemented, will resolve Allegation 1 of this complaint. The provisions of the Agreement are aligned with the allegation and issues raised by the Complainant and the information discussed above that was obtained during OCR's investigation, and are consistent with applicable law and regulation. OCR will monitor the Division's implementation of the Agreement until the Division is in compliance with the statutes and regulations at issue in the case. Failure to implement the Agreement could result in OCR reopening the complaint.

Allegation 2: The Division treated the Student differently because of a perceived disability when it required him to work in a room separated from other students on <XXXX>

In response to the Allegation 2, the Division admitted to placing the Student in a separate room on the dates in question, but denied to OCR that it required the Student to be separated from other students on <XXXX>. Rather, it noted that the Complainant herself requested that the Student remain in a separate room when he was having behavioral issues.

OCR reviewed a copy of a complaint to the Division, dated <XXXX>. In this complaint, the Complainant writes: "In order for my son to be able to stay in school without incident until his IEP which was scheduled for <XXXX>.; I asked if there was a quiet room he could be placed in until he stopped crying, fighting and throwing chairs until he calmed down."

The Complainant conceded to OCR that on <XXXX>, the Student had a significant “meltdown” when they attempted to move him to his first grade classroom, and that she therefore requested that staff place him in a quiet room so that the Student to calm down. According <XXXX> who was in the room with the Student, the Student had no interest in returning to his first grade classroom and continued to have behavior such as crying and screaming when they would interact with him, let alone move him to his classroom. OCR determined that on <XXXX>, the Student came to school with his <XXXX>. The Complainant informed OCR that the Student’s <XXXX> stayed because she was not comfortable leaving the Student due to behavioral concerns. After three days of the Student not being able to transition from the separate room due to behavioral concerns, the Student was placed on homebound instruction.

Based on the aforementioned, OCR finds insufficient evidence to conclude that the Division required the Student to work in a separate room. Rather, a preponderance of the evidence indicates that the Complainant herself directed School staff to place the Student in a separate room when there were behavioral concerns. The evidence further indicates that throughout each day in question, School staff and the Complainant herself had significant concerns about student “meltdowns.” Accordingly, OCR finds insufficient evidence to conclude that the Student was required to be in the separate room, and it is closing this Allegation 2 effective the date of this letter.

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 Judith Risch, the OCR attorney assigned to this complaint, at 202-453-5925 or judith.risch@ed.gov, or Tracey Solomon, the OCR investigator assigned to this complaint, 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

cc: Wendell M. Waller, Esq.