



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

October 14, 2016

Ann Clark
Superintendent
Charlotte-Mecklenburg Schools
P.O. Box 30035
Charlotte, North Carolina 28230

Re: OCR Complaint No. 11-16-1135
Letter of Findings

Dear Ms. Clark:

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 January 18, 2016 against Charlotte-Mecklenburg Schools (the District). The Complainant filed the complaint on behalf of a student (the Student) at XXXX School (the School). The Complainant alleged that the District discriminated against the Student on the basis of disability and retaliated against the Complainant and the Student. Specifically, the complaint alleged that:

1. From August 2015 to March 2016, the School failed to implement the Student's Section 504 plan.
2. From December 2015 to March 2016, the School failed to timely evaluate the Student for a Section 504 plan.
3. The School retaliated against the Complainant and the Student after the Complainant advocated for the Student's rights under Section 504 when:
 - a. From December 2015 to March 2016, the Student's bus pick-up time was erratic;
 - b. In January 2016, the School put the Complainant on a contract regarding the Student's transportation;
 - c. In February 2016, the School accused the Student of bullying other students, when in fact the Student was being threatened by other students; and
 - d. In February 2016, the School did not notify the Complainant in a timely manner of the Student's alleged disciplinary infractions and repeatedly contacted the Complainant at work, putting her employment in jeopardy, regarding issues the Complainant had already spoken with the School about.

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

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

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 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 violation regarding allegation 2, which the District agreed to resolve through the enclosed resolution agreement. However, OCR found insufficient evidence to support allegations 1 and 3. OCR's findings and conclusions are discussed below.

Background

The Student was a fourth grader at the School during the 2015-2016 school year. She moved into the District from Virginia Beach, Virginia, before the start of year. In Virginia, the Student had a Section 504 plan, dated February 2, 2015, for ADHD.

The Complainant asserts that when she registered the Student at the School at the start of the school year, she gave the School a copy of the Student's 504 plan, and the School got a copy of the Student's records from her previous school in Virginia. She said that the School did not implement the Section 504 plan, and when she spoke with the 504 coordinator about it two months after the start of the school year, the 504 coordinator told her that the School did not have a copy of the Section 504 plan. During that time, the Complainant and Student had become homeless, and the Complainant no longer had a copy of the Section 504 plan to share with the School. The Complainant told OCR that she called the Student's Virginia school to see if staff there could send a new copy of the Section 504 plan, and staff at the Virginia school told the Complainant that they had sent a copy of the Section 504 plan in August 2015 and again on October 26, 2015.

OCR reviewed evidence indicating that the Complainant told staff at the School that the Student had a Section 504 plan when she enrolled in the District. On August 24, 2015, the Complainant and School staff completed a "Student in Transition Program Eligibility Assessment." On it, a box is checked providing that at the Student's previous school in Virginia, she had a "504 accommodation plan" for ADHD. There is a handwritten note on the form stating that the Complainant was taken to the School's 504 coordinator. A School counselor sent an email on August 24, 2015, copying the 504 coordinator, which stated in part that the Complainant indicated that the Student has a 504 plan at her Virginia school and that the 504 coordinator would be "working with the family in regards to the student[']s potential 504."

However, OCR also reviewed evidence indicating that the School did not know the Student had a 504 plan when she enrolled in the District, but that she may need one. The 504 coordinator noted in a reconstructed written timeline provided to OCR that she met with the Complainant in person on August 24, 2015, and

collected information from her in regards to her concerns that her daughter needed a 504. Mom was asked about any official diagnosis and if there was a physician that could be contacted. No name or office or physician was received, simply stated that the school has everything. Per the discussion with parent, I was to understand that the student definitely had interventions and she believes her daughter needs a 504.

In an interview with OCR, the 504 coordinator stated that the parent did not say at this meeting that the Student had a 504 plan, just that she was receiving some kind of help at her previous school. A parent contact log completed by the 504 coordinator provides that she spoke with the Complainant on August 24, 2015, and the Complainant said the Student needed a 504 plan.

OCR reviewed documentation of several attempts by School staff to obtain the Student's 504 paperwork from her former school. The 504 coordinator noted in her timeline that after the meeting with the Complainant, she contacted the Student's prior school to see if the Student had any 504 documents. The prior school said they would be sending school records, which would include any 504 documents, within the week. The 504 coordinator stated on her timeline that in September 2015 she checked the Student's file for any updated records, but it only contained her registration information. On October 5, 2015, the School counselor emailed the 504 coordinator, stating that the Complainant had called that morning with questions about the Student's 504 plan. The 504 coordinator responded, asking the School counselor to let the Complainant know that "the vault/records were checked once again but her child's record has not been received by the school. I am aware to look for a 504 for that student but I can't do anything without the permanent record." The School counselor emailed the Complainant to get the name of the Student's prior school to give to the 504 coordinator so that the 504 coordinator could contact the prior school for a copy of the Student's file. On October 6, 2015, a staff person from the Student's prior school emailed the School counselor an attachment, writing that the Complainant "asked me to send this 504 to you." The attachment was a January 27, 2015, intervention plan that, in part, referred the Student to the 504 committee. The 504 coordinator's parent contact log notes that the information provided from Virginia was only an intervention plan and recommendation for 504, not a Section 504 plan. The School counselor surmised in the October 6, 2015, email she sent to the 504 coordinator forwarding the intervention plan that

[I]t appears that she was referred and exited to 504. I am sending this to . . . you to see what the next steps should be for this family with this information in regards to mom's request for 504. Mom had indicated that she had a 504 in place at the prior school, it appears that possibly they were getting ready to implement a 504.

The School staff then reached out to the Complainant regarding the potential need for a Section 504 plan. The 504 coordinator's parent contact log provides that she called the Complainant in October 2015 to request any 504 information the Complainant had for the Student and called the Complainant on October 6 in response to the Complainant's email about setting up something for the 504 plan. She also recorded that follow-up would include gathering the team and scheduling an initial review meeting. An October 26, 2015, form titled "Referral of Concern – Section 504" provides that the parent referred the Student to begin the Section 504 evaluation process. Most of

the form, including questions regarding the specific concerns regarding the student and any interventions tried so far, was left blank.

The 504 coordinator provided in her interview with OCR that in November 2015, she learned that the Complainant would be coming to the School for a meeting on the 23rd. She emailed the Complainant on November 23, 2015, to ask the Complainant to speak with her when she arrived at the School the following day so that she could “give [the Complainant] some information about the 504 process and what would be covered in a meeting.” She also asked the Complainant to let her know when she would be available for a meeting in person or over the phone. She also followed up on a conversation she had had with the Complainant the week before during which the Complainant agreed to contact the Student’s prior school for the 504 paperwork, stating that “I have personally gone through her permanent record and I do not see any 504 documentation.” The 504 coordinator told OCR that as a result of that email, she scheduled a meeting with the Complainant for December 8, 2015, to also include the teacher and LEA. However, the coordinator told OCR that the Complainant cancelled the December 8, 2015, meeting and stated that there was no better time and she could not participate in meetings by phone due to her work schedule. The 504 coordinator’s parent contact log stated that the Complainant called in December to cancel the meeting scheduled for December 8.

After the December 8, 2015, communications, OCR did not receive any evidence indicating that the District attempted to reschedule the meeting until after receiving notification of the Complainant’s OCR complaint in March 2016. The 504 Coordinator told OCR in an interview that she believed that the Complainant wanted to meet, but was unable to find a time to meet. The 504 Coordinator stated that the Complainant was a necessary participant in the meeting in order to establish an accurate picture of what the Student’s needs were, as they did not have any written documentation of health care concerns. The District provided a handwritten note dated February 3, 2016, stating that the Complainant called the School and was asked about the Student’s “504 meeting time and when can she be available via phone conference,” but there is no documentation of a District response.

The 504 Coordinator received notice of the OCR complaint, notification of which was sent to the District Superintendent on March 3, 2016, in March and subsequently called and emailed the Complainant on Friday, March 11, to ask her to come to the School on Monday, March 14, 2016, “to discuss in person your request for an initial 504.” She also stated that the Complainant could participate over the phone, and said that “[w]e were unable to reschedule your meeting from 12/8/15.” The Complainant responded that day, providing that

I was never aware that there was a meeting scheduled for 12/8/2015, or even rescheduled for that matter. As it is 5pm now I will be unable to come in Monday morning as it is too short of notice. I have one 1pm-130[p]m lunch break as I have missed and been written up at work due to cms transportation[.] I am now on contract so unable to miss any[]more work.

The 504 coordinator responded that “you stated back in December that you would have difficulty getting to the school due to your work schedule and transportation.” She asked if the Complainant was available via telephone and requested good days/times for a phone call. The

Complainant responded that the 504 coordinator had previously confirmed that they could have a telephone meeting and the Complainant provided her break times in response, but this March 11 exchange was the first time they had re-discussed the issue.

In the meantime, the Complainant provided a copy of the Student’s Section 504 plan to the Student’s teacher. The teacher stated in a March 21, 2016, teacher input form that although she did not receive a Section 504 plan from the administration at the School, the Complainant provided her with a copy of the plan from her previous school on February 25, 2016. The teacher then began to implement the accommodations from that plan. The 504 coordinator included in her timeline that on March 15, she learned that the Complainant had provided the Student’s teacher with a copy of the Student’s 504 plan from her prior school. The District submitted to OCR a copy of the Virginia Section 504 plan stamped “received” on March 10, 2016.

The Section 504 committee held an eligibility meeting and found the Student eligible for services under Section 504 on March 22, 2016. The Complainant attended telephonically. The committee found that the Student’s ADHD had a substantial effect on her ability to concentrate. To make this decision, the committee checked off that they considered the Student’s attendance records, a psychological evaluation report, parent information, classroom grades, and curriculum based assessments. The 504 Coordinator told OCR that they implemented the Student’s Section 504 plan for Virginia and the assessments listed on the District paperwork were those used to craft the Virginia plan. The team also had available for review the teacher input form completed on March 21, 2016. At the time, the Student had a 76 in English/Language Arts (ELA), 60 in math, 64 in science, and 60 in social studies. The teacher stated that the Student struggled with math concepts, had a lot of difficulty with multi-step math problems, often did not complete assignments on time, and struggled with reading and analyzing informational texts. The teacher told OCR in an interview that the Student had been struggling and performing below grade level throughout the school year. The Complainant signed the Section 504 plan and a consent form for an evaluation under Section 504 on April 5, 2016.

The Student withdrew from the District for the 2016-2017 school year.

Allegations 1 and 2

The Complainant alleged that starting in August 2015, the School failed to implement the Student’s Section 504 plan. The Complainant also alleged that from December 2015 to the time the District received notice of the complaint, the School failed to timely evaluate the Student for a Section 504 plan.

Legal Standards

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. 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.¹

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.

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. North Carolina state regulations require initial evaluations to be completed and placement determined within 90 days of receipt of a written referral (NC 1503-2.2(c)(1)).

Analysis

OCR analyzed allegations 1 and 2 together. The District's responsibility is to provide FAPE to all students with disabilities. A failure to implement a student's Section 504 plan can deprive the student of FAPE, as can a failure to evaluate a student that needs or is believed to need special education or related services. In this case, both the alleged failure to implement the Virginia Section 504 plan and the alleged failure to evaluate the Student for a Section 504 plan could result in a failure to provide FAPE, which would be a violation of Section 504. Either a failure to implement a Section 504 plan or a failure to evaluate a student for services is not necessarily a violation of Section 504, if despite these failures, the student receives FAPE. OCR therefore examined the evidence to determine whether there was a failure to provide the Student with FAPE.

¹ Frequently Asked Questions About Section 504 and the Education of Children with Disabilities, available on OCR's website at <http://www2.ed.gov/about/offices/list/ocr/504faq.html>, provide that if a student with a disability transfers to a district from another school district with a Section 504 plan, the receiving district should review the plan and supporting documentation. If a group of persons at the receiving school district, including persons knowledgeable about the meaning of the evaluation data and knowledgeable about the placement options determines that the plan is appropriate, the district is required to implement the plan. If the district determines that the plan is inappropriate, the district is to evaluate the student consistent with the Section 504 procedures at 34 C.F.R. 104.35 and determine which educational program is appropriate for the student. There is no Section 504 bar to the receiving school district honoring the previous IEP during the interim period.

OCR finds sufficient evidence to conclude that District knew that the Student needed or was believed to need special education or related services due to a disability but failed to either implement an existing 504 plan or evaluate the student for services in a timely fashion, resulting in a failure to provide FAPE. The Complainant indicated at the beginning of the school year that the Student had a Section 504 plan in her prior school and both the School counselor and 504 coordinator acknowledged at the time that the Complainant said the Student had or needed a Section 504 plan. The District was required at that point to either implement the existing Section 504 plan or begin the eligibility process for the Student.

Because the District assumed that the Student did not have a 504 plan at the start of the school year based on receiving only an intervention plan from the Student's prior school, the District had an obligation to start the evaluation/eligibility process for services under Section 504. However, the District did not consider the Student for eligibility for services under Section 504 until March 22, 2016 – 211 days after the Complainant informed the District that the Student had a Section 504 plan in Virginia. OCR finds this delay to be unreasonable.

The District asserts that it did not violate Section 504 because it made multiple attempts to schedule a Section 504 eligibility meeting with the Complainant but that the Complainant declined every request. OCR finds these assertions to be contradicted by the evidence received from the District. The first recorded attempt by the District to schedule a Section 504 eligibility meeting with the Complainant was on October 6, 2015, after the Complainant contacted the School to follow up on the 504 plan and more than a month after the School received notice from the Complainant that the Student had a 504 plan in Virginia. A referral form was completed several weeks later, and the School contacted the Complainant about setting up a meeting more than a month after that, on November 23, 2015. The Complainant responded and agreed to a meeting with the School for December 8, 2015. After the Complainant cancelled the December 8 meeting, there is no evidence that the School spoke with the Complainant until February 3, 2016, when the Complainant called the School. There was no documentation of communication after that until after the School received notice that the Complainant filed a complaint with OCR in early March 2016. Within three weeks of receiving notice of the complaint, the District held an eligibility meeting, found the Student eligible for services under Section 504, and wrote a Section 504 plan without the need for additional evaluations.

OCR concludes that the delay in considering eligibility for the Student under Section 504 was not exclusively caused by the Complainant. Although her work schedule made it hard for her to meet in person, the District was able to work around her schedule and hold a meeting with her within three weeks of receiving notice of OCR's complaint. The 211-day period between the District's initial notice of the Student's need for consideration of eligibility and its decision that the Student was eligible for services, more than twice the period deemed reasonable by North Carolina for the IDEA eligibility process, was unreasonable.

This delay resulted in a failure to provide the Student with FAPE. As the teacher described in her teacher input form, the Student had been struggling and performing below grade level all year. In its eligibility determination in March 2016, the team determined that the Student needed accommodations or related services to receive an equal educational opportunity. Up until that point, expect for the short period of time in which the teacher implemented the Virginia 504

plan, the Student had not been receiving those accommodations or related services. Because the delay in evaluating the Student for services under Section 504 resulted in a denial of FAPE, the delay violated Section 504.

Allegation 3

The Complainant alleged that the District retaliated against her and the Student after she advocated for the Student's rights under Section 504 when (a) from December 2015 to March 2016, the Student's bus pick-up time was erratic; (b) in January 2016, the School put her on a contract regarding the Student's transportation; (c) in February 2016, the School accused the Student of bullying other students, when in fact the Student was being threatened by other students; and (d) in February 2016, the School did not notify her in a timely manner of the Student's alleged disciplinary infractions and repeatedly contacted her at work, putting her employment in jeopardy, regarding issues she had already spoken with the School about.

Legal Standards

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 District took a materially adverse action against the Complainant; and 3) whether there is a causal connection between the protected activity and the materially adverse action. 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.

An individual engages in a protected activity if he/she opposes an act or policy that he/she reasonably believes is discriminatory or unlawful under one of the laws that OCR enforces, or makes a complaint, testifies, assists, or participates in any manner in an OCR investigation, proceeding, or hearing.

For this allegation, the Complainant's alleged protected activity was advocating for the Student's rights under Section 504. The Complainant contacted the School on October 5, 2015, to follow up on the Student's 504 plan. She believed that the School should have been implementing the Student's Virginia 504 plan. By following up with the School regarding a plan she believed they should have been implementing, she engaged in a protected activity.

Analysis

Erratic Bus Times

The Complainant alleged that the District retaliated against her and the Student after she advocated for the Student's rights under Section 504 when from December 2015 until the Complainant filed her complaint, the Student's bus pick-up time was erratic.

- Adverse Action

An adverse action is something that could deter a reasonable person from engaging in further protected activity. Petty slights, minor annoyances, and lack of good manners do not constitute materially adverse actions. Erratic bus pick-up times could deter a reasonable person from further advocating for their children's rights. The Complainant described several adverse consequences of erratic pick-up times, including spending excessive time outside in extreme weather and arriving late at school. A reasonable parent may decide to no longer engage in a protected activity in order to ensure that her child can arrive at school in a safe and timely manner.

In order to determine whether the bus times were in fact erratic, OCR examined the bus's GPS report. The pick-up times were inconsistent in several ways:

- Between December 1, 2015, and March 18, 2016, the time the bus was supposed to pick the Student up changed five times, spanning from 7:15 a.m. to 7:44 a.m.
- Out of the 55 times the GPS recorded picking up the Student between December 1, 2015, and March 18, 2016, the actual pick-up time was more than five minutes earlier or five minutes later than the scheduled pick-up time on 32 occasions, or 58% of the time.
- On 27 out of 55 occasions, or 49% of the time, the Student was picked up more than five minutes earlier or five minutes later than she was picked up on the most recent prior day that the GPS recorded a pick up.

OCR finds from the variations in the Student's pick-up times that they were erratic. OCR therefore finds that a materially adverse action was taken against the Complainant and Student in the form of the erratic bus times.

- Nexus

Next OCR considers whether there is a causal connection between the Complainant's advocacy for the Student and the erratic bus pick-up times.

The Complainant began asking about the implementation of a 504 plan for the Student on October 5, 2015, before the period of alleged retaliatory erratic pick-up times began. However, the bus pick-up times and routes are determined by the transportation department, not the staff at the School with whom the Complainant communicated about the 504 plan. Transportation staff told OCR in July 2016 that they were unaware that the Student had a 504 plan or that the

Complainant was engaged in communications with School staff regarding whether they should be implementing a 504 plan.

OCR finds that there is insufficient evidence to conclude that there is a nexus between the Complainant's 504 advocacy and the District's action because the staff responsible for the action did not know about the advocacy.

- Legitimate Non-Retaliatory Reason

Assuming *arguendo* that a prima facie case of retaliation was established, OCR would next consider the District's legitimate non-discriminatory reason for the erratic bus times.

A District transportation specialist familiar with the Student's bus route told OCR in an interview that the variations in the time the bus was supposed to pick the Student up were caused by other students being added to and removed from the bus route and that the day-to-day variations in the actual pick-up time were caused by traffic and the bus getting stuck at train crossings. Emails and written notes submitted to OCR by the District confirm that the bus was affected by train crossings and mechanical issues. Several emails between School staff and the Complainant provided that the transportation office told the Complainant that the bus was late due to railroad tracks being down, a flat tire on February 18, 2016, a train crossing on February 19, the bus breaking down on April 18, and a substitute bus on April 26.

Traffic, mechanical issues, and being stuck at train crossings are all legitimate non-retaliatory reasons for the bus to be late. The District therefore presents a legitimate non-discriminatory reason for the erratic bus times.

- Pretext

OCR next looks at whether the District's presented reason was pretext for unlawful retaliation.

The District does not keep written logs explaining why, on any given day, the bus arrived to pick the Student up particularly early or late, so OCR cannot examine each individual day for which the bus pick-up time was irregular to determine the reason for the irregularity. However, transportation and School staff explained to OCR in interviews that there are other students who ride the same bus as the Student, and each would be affected by irregularities in the bus departure times, traffic, mechanical problems, and train crossings. A print-out of the bus's route on March 16, 2016, shows that the Student was the fourth of fifteen students to be picked up by the bus, so any delays before reaching her stop would affect the eleven students picked up after her. The bus makes two railroad crossings before picking up its first student, so any delay at those crossings would affect all the students waiting to be picked up.

Because the erratic bus times affected all of the students on the bus, and because the District transportation staff responsible for the bus route were not aware of the Complainant's 504-related advocacy at the School, OCR finds insufficient evidence to conclude that the District's presented legitimate non-retaliatory reasons for the erratic bus pick-up times were pretext for unlawful retaliation.

Transportation Contract

The Complainant alleges that the District retaliated against her and the Student after she advocated for the Student's rights under Section 504 when in January 2016 the School put the Complainant on a contract regarding the Student's transportation. The Complainant signed a transportation contract on January 22, 2016. In it, she promises to contact the transportation office if the Student will not be riding the bus, and to contact the School if there is a problem with transportation. It provides that after five no-shows, transportation may be terminated.

- Adverse Action

Having to sign a transportation contract is a materially adverse action. Not all parents sign transportation contracts – only those who have issues with transportation. The Complainant's contract states that failure to follow it could result in the termination of transportation services. The possibility of losing transportation could have a substantial chilling effect on parents' advocacy for their children.

- Nexus

Next OCR considers whether there is a causal connection between the Complainant's 504 advocacy for the Student and the transportation contract. The McKinney-Vento (MCV) specialist, who is the District-level administrator responsible for overseeing services students receive under the McKinney-Vento Education of Homeless Children and Youth Assistance Act, including transportation, made the decision to send the transportation contract to the Complainant. She made this decision after consulting with the School-level MCV liaison about the Student's transportation issues. The MCV Specialist told OCR that she did not know that the Student had a Section 504 plan until she was asked if she was attending the March 2015 Section 504 meeting. She also told OCR that she was not aware of the Complainant asking the School to implement a 504 plan for the Student. The MCV Specialist was not included in any of the emails exchanged between the Complainant and School staff regarding evaluation for or implementation of the Student's 504 plan. As a district-level specialist in McKinney-Vento issues, she did not participate in the Student's Section 504 process.

OCR finds that there is insufficient evidence to conclude that there is a causal connection between the advocacy and the transportation contract because there is no evidence presented to show that the staff responsible for the transportation contract, the MCV specialist, knew about the 504 advocacy.

- Legitimate Non-Retaliatory Reason

Assuming *arguendo* that a prima facie case of retaliation was established, OCR would next consider the District's legitimate non-discriminatory reason for the transportation contract. The School counselor's written timeline stated that on January 19, 2016, the MCV Specialist stated that a bus contract "will be set up with parent as transportation had reported to [the MCV Specialist] that parent did not have student at stop on time on several occasions." In an interview with OCR, the MCV Specialist stated that she suggested the contract due to the many

complications in the Complainant’s understanding the bus system. Providing clarification in how transportation works and holding the Complainant accountable for ensuring that the Student is at the bus stop are legitimate non-retaliatory reasons for establishing a transportation contract with the Complainant.

- Pretext

OCR next looked at whether the District’s presented legitimate non-retaliatory reason was pretext for unlawful retaliation. OCR first looked for documentation regarding any occasions on which the Complainant did not have the Student at the bus stop before the enactment of the transportation contract and at documentation of any misunderstandings on the part of the Complainant with regards to the bus system. There was one documented transportation incident before January 22, 2016. On January 19, 2016, the Complainant contacted the School upset because the bus never came to pick up the Student. The School Counselor emailed the Complainant later that morning and told her that the bus was late due to a train and that transportation tried to contact the Complainant on her cell phone twice, but were unable to reach her. The Counselor said that transportation was able to reach the Complainant on a third try and offered to send a bus back out to pick up the Student. The Complainant responded, stating that transportation should not have to rely on her answering her phone in order to send a bus to pick up the Student for school. In her response, the counselor directed the Complainant to contact transportation directly if she had any concerns; that if transportation concerns continued, the Student could attend the school that she was currently zoned for at her current address; that her new pick-up time effective the following day would be 7:30; and that the bus would not be able to wait for her. The Complainant responded again, saying she wasn’t sure why the Student’s transportation depended on the Complainant answering her phone, that she always has the Student at the bus stop on time, and that the Student should not have to transfer schools because the District failed to provide transportation. A few hours later, the counselor emailed the Complainant stating that the MCV specialist asked the counselor to set up a bus contract with the Complainant.

OCR also looked at the circumstances under which other parents in the District were placed on transportation contracts. The MCV Specialist provided via email that there were other CMS students on transportation contracts. She states that each school has its own protocol for bus contracts for MCV families and that there were some number in the District on contracts, but the Complainant was the only one at the School on a contract because “there have not been any issues with the other MCV students there.” In an interview with OCR, the MCV Specialist stated that she was not aware of any specific students or parents in the District who were on transportation contracts, but knew that they could use them for parents having issues with transportation. The counselor, who is also the MCV liaison for the School, told OCR in her interview that she did not know if there were any other students at the School or in the District who were on transportation contracts.

OCR finds that there is insufficient evidence to conclude that the District’s presented reasons for placing the Complainant on a transportation contract were the District’s actual reasons. Although the District asserted that they placed the Complainant on a contract because there were occasions where she did not make the Student available for pick-up and there was confusion as to how the

bus system worked, this assertion is not supported by the documentation provided by the District. There were no documented incidents before the enactment of the transportation contract in which the Complainant did not make the Student available at the bus stop; instead, the day that the contract was suggested, the Complainant complained about the bus being late. Although the Complainant did express some frustration and confusion to the District, she did not seem confused over how the bus system worked; she instead expressed frustration over the bus being late, over the District's failure to send a bus after being unable to reach the Complainant on her cell phone, and over the District's suggestion that the Student may attend school elsewhere.

However, OCR finds that there is insufficient evidence to conclude that the District's presented reason is pretext for retaliation against the Complainant based on her Section 504 advocacy. None of the evidence reviewed by OCR presented a link between the transportation issues and contract and the Complainant's conversations with School staff regarding the Student's Section 504 plan. The Student's transportation is provided pursuant to her needs as a homeless student, and the contract was coordinated by the MCV/homeless services specialist, who was not involved in the conversations regarding services under Section 504. The frustrations expressed by the parent all related either to mechanical bus issues, to actions of transportation staff who were unaware of the fact that the Student was a student with a disability and the Complainant had been advocating for the Student's rights under Section 504, or to comments made by School staff relating to the Student's status as a homeless student.

Because OCR finds that there is insufficient evidence to conclude that the enactment of the transportation contract was based upon retaliation for the Complainant engaging in advocacy under Section 504, OCR concludes that there is insufficient evidence to find that the District engaged in retaliation considered unlawful under any of the laws enforced by OCR.

Bullying Incident and Communication Regarding It

The Complainant alleges that the District retaliated against her and the Student after she advocated for the Student's rights under Section 504 when in February 2016, the School accused the Student of bullying other students, when in fact the Student was being threatened by other students; and the School did not notify her in a timely manner of the Student's alleged disciplinary infractions and repeatedly contacted her at work, putting her employment in jeopardy, regarding issues she had already spoken with the School about.

- Adverse Action

School staff told OCR that they had a meeting with the Complainant in February 2016 regarding some recent incidents of "girl drama" involving the Student that had been going on for a while. The Dean told OCR that she called the Complainant the day after that meeting. Blaming a student for disciplinary infractions that the student did not instigate could deter a reasonable parent from engaging in further protected activity. Disciplinary write-ups can lead to school exclusions, marks on a student's record, and academic disengagement. In order to protect a student from these consequences, a parent could reasonably be deterred from further advocating on behalf of the student. Delaying notification of disciplinary concerns and repeatedly contacting parents at work could also deter a reasonable person from engaging in further protected activity.

Withholding information from a parent regarding her child's behavior issues could negatively affect the parent's effectiveness in addressing potential problem behaviors, and excessively calling the parent at work could put the parent's livelihood in danger. A reasonable person could be deterred from engaging in further protected activity in order to avoid these negative consequences. OCR therefore finds sufficient evidence of a materially adverse action to proceed to consider whether there was a causal connection between the protected activity and the materially adverse action.

- Nexus

Next OCR considers whether there is a causal connection between the Complainant's advocacy for the Student and the bullying accusation and communications.

Two staff members, the Student's teacher and the Dean of Students (the Dean), participated in the in-person meeting with the Complainant, and the Dean spoke with the Complainant via phone after the in-person meeting. The teacher told OCR that she did not know the Student had a Section 504 plan until the Complainant told her the Student had a 504 plan and gave her a copy of the Virginia 504 plan at the end of February 2016. The in-person meeting about the bullying occurred on February 10, 2016, before the teacher found out that the Student had a 504 plan or had reason to believe that there was a disagreement between the Complainant and other School staff regarding the implementation of the Student's Section 504 plan. The Dean told OCR that she did not know the Student had a Section 504 plan or that the Complainant asked that the Student's 504 plan be implemented until after the District received this complaint in March 2016. This was after the February 10, 2016, in-person meeting and February 11, 2016, phone call.

There is insufficient evidence to conclude that either of the School staff persons involved in the February 2016 meeting/phone call with the Complainant knew before that meeting that the Student had a 504 plan or that the Complainant had requested that the School implement a 504 plan for the Student. There is therefore insufficient evidence for OCR to find a causal connection between the Complainant's 504 advocacy and the February 2016 communications.

- Legitimate Non-Retaliatory Reason

Assuming *arguendo* that a prima facie case of retaliation is established, OCR next looks at the District's legitimate non-retaliatory reason for meeting with the parent about the alleged bullying. The District asserts that the Student did engage in negative behavior and notified the Complainant as it would notify any parent. If a student engages in negative behavior, it is reasonable for a school to contact the parent to notify the parent of the student's behavior. The District thus presents a legitimate non-retaliatory reason for its action.

- Pretext

In order to determine whether the District's presented legitimate non-retaliatory reason is pretext for unlawful retaliation, OCR looked at the nature of the bullying incident and the School's communications with the parents of the other students involved.

On February 3, 2016, the Complainant emailed the counselor and teacher asking them to check on the Student and give the Complainant an update because the Student did not want to go to school and the Complainant believed that there was something going on at school that the Student was not telling her about.

On February 9, 2016, the School Counselor sent an email to the Dean, the teacher, and several other School staff members to tell them that another student in the Student's class told her that the Student and a third student told her they were going to fight her. The student also reported that the Student said she was going to fight some fifth graders. The Counselor responded that she spoke with all the girls involved to explain the consequences of fighting and threatening to fight.

The Student's teacher told OCR that she remembered the Student being involved in an incident that involved a fifth grade girl who wrote notes to the Student threatening to beat her up because the girl's boyfriend was talking to the Student. The teacher could not remember when this happened. The teacher said that the Student brought the note to the teacher, and the teacher gave the note to the Dean. She stated that the "girl drama" had been going on for a while, so the School called a meeting with the Complainant to resolve it. The teacher told OCR that when issues of this nature come up, the School's general practice is for the teacher to call the parent, and if things continue after that, the teacher turns the issue over to the Dean. The teacher could not remember if she called the Complainant first regarding this incident before turning the issue over to the Dean. She did not call the other student's parents because the other student was not in her class. She did not recall or believe that she made any follow-up calls to the Complainant regarding the drama after the incident.

The teacher also described a second bullying incident with the Student later in the year that prompted a phone call to the Complainant but not an in-person meeting. She could not remember the date of the second incident. The teacher told OCR that a new girl joined the Student's class and the Student did not want to let the new student into her circle of friends. The Student sent notes to the new student saying things like "you're not my friend." The teacher spoke on the phone with the parents of both students.

The Dean told OCR that she remembered meeting with the Complainant on February 10, 2016, regarding an incident of bullying. The Dean said that the Complainant called her and requested a conference to discuss what was going on between the Student and other girls in her class. She said that there was a new student in the Student's class and the Student tried to get other students to not be friends with the new student. The Dean told OCR that she called the Complainant the day after the in-person meeting to let the Complainant know that she and the School counselor were putting together strategies for the Student on how to be a friend. She said she did not make any more follow-up calls. She also told OCR that it was School policy to call the parent when an incident of this nature occurred.

The Dean's contemporaneous written notes from the February 10, 2016, meeting provide that the teacher described the situation as girls going back and forth, where another girl started it. The District provided an annotated copy of the note that the Student turned in to her teacher, in which a fifth grade student wrote "b----, u suck d---." The Student wrote "You're a b---- and u live in a

ditch.” The District also provided notes from the School counselor’s session with the Student the next day discussing strategies to resolve the issues with the other girls.

OCR finds that there is insufficient evidence to conclude that the District’s proffered reason for its actions is pretext for unlawful retaliation. The School staff’s contemporaneous notes from the meeting and their recollections in interviews with OCR confirm that the Student was engaged in a situation with other students that could necessitate a parent meeting. There is no indication in the evidence provided to OCR that the School delayed communicating with the Complainant based on her 504 advocacy for the Student. The notes from February 11, 2016, also confirm that the School counselor met with the Student to discuss strategies for resolving issues with other girls.

Because there is insufficient evidence of nexus and pretext, OCR finds that there is insufficient evidence to conclude that the District retaliated against the Complainant by meeting with her about the Student’s alleged bullying.

Conclusion

On October 14, 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 October 14, 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 Nicole Dooley, the OCR attorney assigned to this complaint, at 202-453-5676 or nicole.dooley@ed.gov.

Sincerely,

/S/

Michael Hing
Supervisory Attorney
Office for Civil Rights
District of Columbia Office

Enclosure

cc: Andre F. Mayes, District Attorney